Corporate Environmental Crime

Second Report of Session 2004–05

Report, together with formal minutes, oral and written evidence

Ordered by The House of Commons to be printed Wednesday 26 January 2005
The Environmental Audit Committee

The Environmental Audit Committee is appointed by the House of Commons to consider to what extent the policies and programmes of government departments and non-departmental public bodies contribute to environmental protection and sustainable development; to audit their performance against such targets as may be set for them by Her Majesty's Ministers; and to report thereon to the House.

Current membership

Mr Peter Ainsworth MP (Conservative, East Surrey) (Chairman)
Mr Gregory Barker MP (Conservative, Bexhill and Battle)
Mr Harold Best MP (Labour, Leeds North West)
Mr Colin Challen MP (Labour, Morley and Rothwell)
Mr David Chaytor MP (Labour, Bury North)
Mrs Helen Clark MP (Labour, Peterborough)
Sue Doughty MP (Liberal Democrat, Guildford)
Mr Paul Flynn MP (Labour, Newport West)
Mr Mark Francois MP (Conservative, Rayleigh)
Mr John Horam MP (Conservative, Orpington)
Mr John McWilliam MP (Labour, Blaydon)
Mr Elliot Morley MP (Labour, Scunthorpe)
Mr Malcolm Savidge MP (Labour, Aberdeen North)
Mr Simon Thomas MP (Plaid Cymru, Ceredigion)
Joan Walley MP (Labour, Stoke-on-Trent North)
David Wright MP (Labour, Telford)

Powers

The constitution and powers are set out in House of Commons Standing Orders, principally Standing Order No. 152A. These are available on the Internet via www.parliament.uk.

Publication

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at: www.parliament.uk/parliamentary_committees/environmental_audit_committee.cfm.

A list of Reports of the Committee in the present Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are: Mike Hennessy (Clerk); Lynne Spiers (Second Clerk); Eric Lewis (Committee Specialist); Elena Ares (Committee Specialist); Louise Combs (Committee Assistant); Caroline McElwee (Secretary); and Robert Long (Senior Office Clerk).

Contacts

All correspondence should be addressed to The Clerk, Environmental Audit Committee, Committee Office, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 6150; the Committee's e-mail address is: eacom@parliament.uk

References

In the footnotes of this Report, references to oral evidence are indicated by ‘Q’ followed by the question number. References to written evidence are indicated by page number as in ‘Ev12’. number HC *-II
# Contents

<table>
<thead>
<tr>
<th>Report</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conclusions and recommendations</td>
<td>3</td>
</tr>
<tr>
<td>Introduction</td>
<td>7</td>
</tr>
<tr>
<td>The Scope of the Inquiry</td>
<td>7</td>
</tr>
<tr>
<td>What is corporate environmental crime?</td>
<td>8</td>
</tr>
<tr>
<td>The scale of the problem – an overview</td>
<td>9</td>
</tr>
<tr>
<td>The water companies</td>
<td>11</td>
</tr>
<tr>
<td>Small and Medium-sized Enterprises (SMEs)</td>
<td>14</td>
</tr>
<tr>
<td>The deliberate offender</td>
<td>15</td>
</tr>
<tr>
<td>Resources</td>
<td>16</td>
</tr>
<tr>
<td>To comply, or not to comply?</td>
<td>18</td>
</tr>
<tr>
<td>The threat of detection and prosecution</td>
<td>19</td>
</tr>
<tr>
<td>Fines as a deterrent</td>
<td>20</td>
</tr>
<tr>
<td>Alternative methods to ensure compliance</td>
<td>21</td>
</tr>
<tr>
<td>Education and publicity</td>
<td>24</td>
</tr>
<tr>
<td>Accepting Responsibility</td>
<td>26</td>
</tr>
<tr>
<td>Self-promotion</td>
<td>27</td>
</tr>
<tr>
<td>Endnote</td>
<td>28</td>
</tr>
<tr>
<td>Formal minutes</td>
<td>31</td>
</tr>
<tr>
<td>Witnesses</td>
<td>32</td>
</tr>
<tr>
<td>List of written evidence</td>
<td>33</td>
</tr>
<tr>
<td>Past reports from the Environmental Audit Committee since 1997</td>
<td>34</td>
</tr>
</tbody>
</table>
Conclusions and recommendations

1. With just one exception, all of the companies on the Agency’s list of top ten highest fines in 2003 were waste and water companies. (Paragraph 8)

2. We look forward to seeing the outcome of the waste sector related enforcement cases currently being put together by the Environment Agency. We remain concerned, however, that there appears to be a discrepancy between what organisations like ESA and SITA are telling us they believe is happening with waste following the co-disposal ban, and the position described by DEFRA. (Paragraph 11)

3. Irrespective of any mitigating factors which pertain to some of the pollution incidents resulting from Thames Water’s activities, and regardless of the apparent legality of the discharges into the Thames, we are compelled to express our abhorrence of this legitimised pollution and the depressing attitude with which it is accepted. (Paragraph 15)

4. Many of the sewerage systems around the UK are old and dilapidated and would be enormously expensive to upgrade. If the water company also has what is tantamount to a ‘get-out’ clause because the system is operating as it was designed to do, even when this means sewage entering water-courses, what results is an environmental threat sufficiently intractable that no-one will tackle it head on. This is clearly unsatisfactory. (Paragraph 16)

5. We welcome the news that Thames Water, working with Ofwat, have developed a business plan to upgrade not just the sewage works at Mogden but also the other three major works identified as significant contributors to the problem of sewage overflow into the River Thames. (Paragraph 18)

6. There is no doubt that agreeing and then implementing a long-term solution to the overflow and pollution problems afflicting the River Thames is going to involve making some tough decisions and significant investment. What is also clear is that, whether the decision is for a tunnel under London, or something else, the status quo cannot be allowed to remain. The likely timeframe for action set out by Thames, which appeared to be confirmed by Elliot Morley during the debate on the 18th January, means that a decision with regard to the proposed plans for a tunnel under London to alleviate the threat of continued and increasing sewage and waste overflows into the Thames must be made as a matter of some urgency and we would expect the Government to be able to let us know the outcome of their deliberations by the time it responds to this report. (Paragraph 21)

7. A significant and unacceptable number of Small and Medium-sized Enterprises are responsible for an unacceptable level of environmental crime. It is incumbent upon all businesses, whatever their size, to insure that they operate within legal parameters. (Paragraph 25)

8. In this respect, the idea that the Ministry of Sound, and companies like it, are somehow compelled to fly-post in order to reach its customer base is nonsense. (Paragraph 28)
9. We are pleased to see the stronger tools proposed to be given to local authorities in the Clean Neighbourhoods and Environment Bill, especially those which allow local authorities to recover the costs of removing fly-posting (and graffiti – increasingly being used for commercial advertising) and which extend the graffiti removal scheme currently in place to fly-posting. (Paragraph 28)

10. Given that, according to Environment Agency figures, the number of substantiated environmental incidents is holding steady at around 29,000 a year, and that the vast majority of these incidents related to unregulated, un-permitted sites, it seems incredible that DEFRA would cut so dramatically the Grant in Aid funding to the Environment Agency. This decision must be reviewed quickly if the Agency is to continue to deal effectively with this important area of its work. (Paragraph 33)

11. We commend the Environment Agency and the local authorities for continuing to work together and for developing a partnership which, if successful, may go some way to effectively handling incidents of illegal waste disposal and fly-tipping and look forward to seeing a review of the initiative in due course. (Paragraph 34)

12. We commend Anglian Water, Wessex Water and Dwr Cymru for reducing pollution incidents in 2003 and look for a similar commitment and achievement from all other water companies. (Paragraph 36)

13. Time and again over the course of our inquiries into environmental crime, it has been brought home to us that unless there is a real threat of being detected, the offender will continue to offend. We cannot stress strongly enough the importance of the threat of detection as a deterrent. (Paragraph 38)

14. The fact that there is a perceived inconsistency of approach employed by the Environment Agency in prosecuting environmental crime around the country is unhelpful and worrying and must be addressed by the Environment Agency as a matter of urgency. (Paragraph 39)

15. We do not agree with the argument that certain sectors are in some way being singled out for harsher treatment than others simply because it is easier; if an environmental regulation is being infringed then the Agency has every right and indeed a duty to act against the offender. Where we do have some concern is with regard to the fact that the majority of incidents are, by the Agency’s own reckoning, committed by those in the unregulated sector. This is not adequately policed and this imbalance must be addressed by the Agency and DEFRA. (Paragraph 40)

16. For those companies and organisations who are not dissuaded from their illegal activity by the threat of detection, prosecution and sentencing, whether that be a financial penalty or, in a very few and extreme cases, a custodial sentence, other means have to be found to ensure their compliance with environmental laws and regulations. (Paragraph 45)

17. We are reassured to see that DEFRA clearly recognises that the status quo with regard to how environmental crime is dealt with cannot be allowed to continue. (Paragraph 47)
18. The creation of a robust civil penalty regime as an alternative means with which to deal with environmental crime is something we considered in our earlier reports and which, subject to learning more of the detail of the proposal, we would support. (Paragraph 48)

19. Given cuts in Grant in Aid funding for the Agency in the region of £4 million, and the additional requirement to make efficiency savings of over £75 million, any suggestion that it can assume responsibility for a civil penalty regime without a significant increase in funding will doom this initiative to failure. (Paragraph 49)

20. Whilst no one would wish to see a business fail, if the civil penalty is effectively without teeth then it is likely to fall at the first hurdle. It is important that the Agency is prepared to use a sufficient level of fine to ensure that the penalty regime works effectively both as a means of prevention as well as a cure. (Paragraph 50)

21. We support the Agency in its intention to make greater use of the lifestyle provisions of the Proceeds of Crime Act 2002. We cannot consider that the survival of a business which is a serial offender in environmental terms and shows no signs of wanting to improve its lamentable environmental performance should rank higher in terms of importance than the protection of the environment which that business desecrates. (Paragraph 51)

22. We would urge DEFRA and the Environment Agency to consider how best to harness this tactic of “naming and shaming” corporate environmental offenders in the interests of environmental protection. (Paragraph 53)

23. We do not think it is unreasonable to expect businesses which are subject to environmental laws and regulations to complete an annual check-up of how they are performing against requirements; we see this simply as a natural progression which follows, if not accompanies, the introduction of a civil penalty regime. We would urge DEFRA to consider mandating such an assessment. (Paragraph 54)

24. Prevention is always going to be better than cure and a robust programme of education and publicity led by the Government is crucial to this being achieved. What we have seen in this inquiry has echoed our earlier findings in that successful communication of policy, new legislation and regulation is patchy. (Paragraph 55)

25. It cannot be acceptable for businesses to be left waiting an improbably long time for guidance on what for many were fundamental changes to their practices and procedures which could not be put into place in the time left to them. The debacle surrounding the implementation and publication of the ban on co-disposal of hazardous waste demonstrates all too clearly the failure of the Government adequately to engage with industry in a timely fashion. This must be addressed as a matter of urgency. (Paragraph 59)

26. It is clear to us that until we have successfully embedded learning about the environment, and the impact of our actions on it, into our formal and informal education systems, we will continue to see both the business and the individual commit environmental crimes. (Paragraph 60)
27. Without doubt, one of the greatest challenges facing the Government is to make businesses fully understand that they are as duty bound to comply with environmental regulations as they are, for example, with Health and Safety regulations. (Paragraph 62)

28. Whilst we accept that it is early days yet with respect to the development and introduction of a civil penalty regime, we assume that an effective method of communicating with all businesses to whom the penalty might be applied must be a fundamental pillar of the structure of the regime. Failure to include an effective communication strategy into the system at the outset may lead to unforeseen rights of appeal being granted to those companies who might seek to demonstrate ignorance. (Paragraph 63)

29. We cannot condone fly-posting under any circumstances, but we accept that some businesses do fall outside of the more traditional and accepted parameters for advertising. We would encourage them to work with others in their industry, and the local authorities, to find alternative and authorised sites for poster-based advertising. (Paragraph 65)

30. The Ministry of Sound has told us that it is already exploring the concept of text messaging as a method of publicising its club nights and we would encourage it and like businesses to pursue this and other innovative methods as viable alternatives to fly-posting. (Paragraph 66)

31. Without doubt, the one issue that links all four of our inquiries on environmental crime is that it is by and large not an issue which comes high enough on anyone’s agenda to rate any real attention or make any significant impact on behaviour. (Paragraph 67)

32. It is incumbent on every business to ensure that, as a matter of course, and not as an additional extra if there is the time and money, it and its employees not only know what its environmental obligations are but also comply with them. (Paragraph 69)
Introduction

The Scope of the Inquiry

1. On 22 July 2004, the Sub-committee on Environmental Crime announced that it would be holding an inquiry into Corporate Environmental Crime. This was the fourth, and last, in a series of inquiries which has focused on environmental crime. It was preceded by inquiries into Environmental Crime and the Courts,¹ Fly-tipping, Fly-posting, Litter, Graffiti and Noise,² and Wildlife Crime³.

2. In its press release, the Sub-committee expressed a desire to hear responses to the following questions:

- Do the bodies responsible for investigating and prosecuting corporate environmental crime have sufficient powers and resources to do so? Are they able to conduct robust and effective investigations into the source of the crime and mount effective prosecutions that target those who are responsible for the crime, as well as the person actually committing it?

- Are the penalties for corporate environmental offences adequate? If not, how can penalties and punishments be better targeted to ensure that the criminal justice system is effective in acting as a deterrent?

- What alternatives, outside the criminal justice system, should be considered for dealing with corporate environmental offences in order to reduce environmental harm by business? Should there be greater use of alternative means of punishment, such as the use of prohibition notices, civil penalties and the confiscation of company assets?

- Are there too many environmental duties and responsibilities on corporate bodies which serve only to stifle their ability to compete in the market place? Are the laws and regulations applied uniformly across the business sector?

- Is the Government doing enough to educate the business sector in terms of their legal obligations to environmental issues which impact on their business? Is there sufficient dialogue and co-operation across Government and the business community to ensure that best practice, for example, can be shared?

As with previous Reports based upon the work of the Sub-committee, this Report considers only the situation in England and Wales.

3. Eighteen memoranda were received, some of which were supplementary to evidence sessions. Oral evidence was heard from seven individuals or organisations. We are grateful

---

¹ Environmental Audit Committee, Sixth Report of Session 2003-04, Environmental Crime and the Courts, HC126
for all the evidence given to the Sub-committee during this inquiry. The Sub-committee would also like to extend its thanks to Mr Paul Stookes,\(^4\) who has acted as Specialist Adviser to the Sub-committee throughout the course of the four inquiries into Environmental Crime.

4. There is no doubt that much of the evidence we received for this inquiry echoed that provided for both Environmental Crime and the Courts\(^5\), and Fly-tipping, Fly-posting, Litter, Graffiti and Noise.\(^6\) We make no apology for re-visiting some of the issues raised in those two inquiries. We also take the opportunity to reinforce some of the key recommendations we made as a result of those inquiries. Some of the areas touched on also have particular resonance in the wake of the Government’s introduction of the Clean Neighbourhoods and Environment Bill, which we consider a timely piece of legislation. Although that Bill only deals with a few areas connected to corporate environmental crime, in some instances, for example with regard to fly-posting, it represents a very positive move in the right direction.

5. We felt that it was important that this inquiry examined in more detail than its predecessors the reasons why corporate environmental crime is committed. For the purposes of this inquiry, we were fortunate to be able to take oral evidence from the Environment Agency, the Environmental Services Association (ESA), SITA, the Federation of Small Businesses (FSB), Thames Water, Anglian Water and the Ministry of Sound. We felt that these witnesses represented the diverse nature of those who find themselves, for whatever reason and to whatever degree, contravening environmental law or regulations. They almost all also represented businesses with good and bad stories to tell about how they, and others in their areas of business, were working to meet the challenge of marrying the need to be environmentally responsible whilst running businesses for profit.

**What is corporate environmental crime?**

6. During the course of this inquiry, and indeed the preceding three Sub-committee inquiries into environmental crime, it has become clear that, with varying degrees of seriousness, crimes impacting on the environment are happening all the time and are being committed, not only by individuals, but by businesses, organisations and other corporate bodies. This inquiry took a broad and practical approach to the term ‘corporate environmental crime’, which may be defined as any environmental crime that has been committed by any corporate body. The sub-committee was concerned not to be tied to any formal or legal definition of what was a company or a legal body so this could include, among other things, a sole trader, a partnership, limited company or Plc. The importance of the inquiry was to hear from a range of corporate bodies and their representatives on the present environmental criminal justice system, while at the same time recognising that an environmental sentence for a corporate body is at present limited to a fine. Also, when we

---

\(^4\) Mr Paul Stookes, LLB, MSc, CEnv, Solicitor and Chief Executive of the Environmental Law Foundation


refer to corporate environmental crime we are talking about quite a varied range of actions. This can include offences as wide-ranging as, for example, fly-tipping (the illegal dumping of waste), fly-posting (plastering public spaces with advertising posters which blight the area), and pollution incidents, whether that be as a result of chemicals, farm slurry or general sewage waste, being discharged into the watercourse. During our inquiry into Wildlife Crime we saw evidence of environmental crimes being committed within the building and construction industry and by local authorities. There are many more, certainly too many to list here.

7. The reasons for committing corporate environmental crimes are also varied. The crime may occur because the business concerned is ignorant of its environmental obligations. It may also occur all too often as a result of negligent behaviour, for example, where businesses are poorly managed, staff are inadequately trained or equipment and infrastructure has not been maintained to the required standard, allowing a pollution incident to occur. But perhaps the most depressing cause is when corporate environmental crime is the result of a deliberate and intentional illegal act, a decision taken in the full knowledge that the act is illegal and will result in environmental harm. During the course of this inquiry we have seen evidence of environmental crime occurring for all of these reasons.

The scale of the problem – an overview

8. The Environment Agency’s (hereafter the Agency) “Spotlight Report 2003” contains “good news” and “disappointing news”, the latter of which is, in fact, bad news. The good news is that, in 2003, serious pollution incidents, those classified as category 1 and 2, dropped by 15% over the previous year. There were, in fact, 1,250 such serious incidents, 613 of which were caused by industry; this too represented a drop of 12%. Serious pollution incidents caused by the farming industry and waste management sector also reduced by a quarter. At the same time, the Agency reports that more sites were well-managed and waste recovery was improving. However, the “disappointing news” makes grim reading. Twenty-eight industrial sites were judged by the Agency to have “very poor” management standards in 2003 and yet there had been none in 2002. Even worse was the news that not only were some businesses harming the environment, but a number were repeat offenders. The Agency said:

“Serious pollution incidents caused by the water industry increased by 23 per cent this year and it now causes more than any other sector. Incidents from the construction and metals sector also increased. We prosecuted 266 companies this year, resulting in total fines of £2, 237, 667. Of these, 61 were fined large amounts (more than £10,000). At £676,500, the waste industry received the largest fines and five of the 10 highest fines were awarded against waste businesses.”

---

8 “Greener business is good business, Spotlight on business, Environmental performance in 2003”, Environment Agency
9 “Greener business is good business, Spotlight on business, Environmental performance in 2003”, Environment Agency
In fact, with just one exception, all of the companies on the Agency’s list of top ten highest fines in 2003 were waste and water companies. Water companies were also well-represented in the group of eleven companies named as repeat offenders. In addition to this, the Agency reports that forty-two of the sixty-one businesses which incurred large fines in 2003 did so for multiple offences.

9. Of course, the “Spotlight Report” provided by the Agency can only give us a picture of those incidents the Agency itself regulates and is alerted to. But what of the sectors not regulated by, or simply not visible to, the Agency? We were particularly concerned by the evidence we took from Mr Mike Walker of the Environmental Services Association (ESA) and Mr Per-Anders Hjort, Managing Director of SITA-UK. Referring to the changes which resulted from the ban on co-disposal of hazardous waste with non-hazardous waste, which came into force in July of 2004, Mr Walker expressed concern about how, and where, such waste was now being disposed of. He told us,

“There are great difficulties. What we do know is that our members would have expected greater amounts of hazardous waste to go through their treatment facilities following the changes both this year and two years ago. Liquid hazardous waste was banned from landfills in July 2002. There has been no increase in liquid hazardous waste going through treatment facilities since. The question is: where has that gone? Similarly, following the ban on co-disposal this year, there are reports that hazardous waste is not going to hazardous waste landfills. Where is it going? Whilst nobody can say how much hazardous waste has been illegally dumped, it is certain that some of it is missing, has fallen out of the system, as it were.”

10. Nor were we reassured by Mr Hjort who told us that there were areas of the country where SITA-UK no longer bothered to bid for contracts or make investments because it could not compete on price. Whilst Mr Hjort didn’t discount the fact that it may be that SITA-UK was more expensive than some of the companies against which it might be bidding, we thought it telling that he also said that, at the prices being quoted by others in the market, his “gut feeling is that the price level which is prevailing in some parts of the country is not the right price for treating waste in the correct way.”

11. The matter of the disappearing waste, and the possibility that what waste there was, was being disposed of in a far from safe manner, was raised with Elliot Morley, Minister of State, Department for Environment, Food and Rural Affairs, when we took evidence from him on 20 October 2004. Mr Morley outlined two reasons which he said explained why some companies had not seen an increase in business following the co-disposal ban. First, there was the fact that many businesses had taken the decision to “bring forward hazardous waste disposal before the July deadline;” second, because of increasing costs many

---

10 Ev22
12 Ev22
13 Ev23
14 Hazardous Waste and Waste Policy, Minutes of Evidence, HC1184-I, Session 2004-05
15 ibid Q 2
companies have looked at how they can minimise and treat their own hazardous waste on site. As to the standard of waste disposal, the Minister hinted at some targeted enforcement plans which were being developed which would “send a very clear message to the whole sector that illegal activity will not be tolerated and we plan to make that a very high profile affair”. The Environment Agency also suggested that certain enforcement cases they were currently working on would have an impact on this area of activity. **We look forward to seeing the outcome of the waste sector related enforcement cases currently being put together by the Environment Agency.** We remain concerned, however, that there appears to be a discrepancy between what organisations like ESA and SITA are telling us they believe is happening with waste following the co-disposal ban, and the position described by DEFRA.

### The water companies

12. The water companies represent a very interesting conundrum. We are all, without choice, their customers. We rely on them to perform the unseen and largely unrecognised tasks that ensure that when we turn on the tap we get clean, safe water and when we empty the bath or flush the toilet, that that waste water is safely disposed of. The nature of their business means that they are directly linked to the environment. Any action they take, or indeed in some instances, any inaction on their part, can have a dramatic and damaging impact on the environment. Mr Roy Pointer, Chief Executive of Anglian Water referred to water companies as “the thin green line between the effects of society and the environment.” But a water company is, first and foremost, a business. It has shareholders who expect to see returns on their investment.

13. The sub-committee took oral evidence from two of the UK’s water companies, Anglian Water and Thames Water. They are representative of an industry which is responsible for a large workforce and a massive, and in large part aging, water and sewerage infrastructure. None of the water companies falls into the category of the ignorant polluter. It is a heavily regulated industry which is under intense scrutiny from the Agency and Ofwat, for example, and the companies are well-versed in their environmental obligations. Nor do we believe that the water companies are in general careless or negligent. They, perhaps more than any other business, are vulnerable to public perception. During oral evidence both companies were at pains to stress their commitment to the environment and we have no reason to disbelieve them. And yet, the water companies continue to cause pollution incidents. Both Thames Water and Anglian Water feature in the “Spotlight on Business” both as repeat offenders and as the recipients of some of the top ten highest fines in 2003.

14. In fact, one does not need to look far for possible reasons for the water companies’ environmental record. Thames Water, for example, has 13 million customers across London and the Thames Valley for whom it provides waste water facilities. They are responsible for 349 sewerage treatment works, 42,000 miles of sewerage network and 2,246 sewage pumping stations. Anglian Water collects waste from domestic and industrial premises in an area covering 20% of England and Wales. It has 21,749 miles of sewers.
1,077 wastewater treatment works and 4,404 wastewater pumping stations. It too features in the same top ten as Thames Water and is also named as a repeat offender.

15. The water companies, in their evidence, pointed to the fact that the very nature of their business means that they have no control over what goes into their systems when it comes to waste but that they still have to treat what comes out. Thames Water also pointed to the fact that large parts of the system they manage, certainly in London, were built in the Victorian era. As Mr Sexton pointed out, this Victorian system is actually doing the job it was designed to do and part of that system provides for overflows into the Thames. It is simply not designed to cope with the demands placed upon it in the twenty first century and things can only get worse. When asked about an incident on 3 August 2004, when some 600,000 tonnes of raw sewage was discharged into the Thames, and the likelihood that such incidents would continue, Mr Sexton’s reply was unequivocal,

“No [they] will […] The Thames Tideway suffers from over 50 overflows to the tidal river. That is how the system was designed in Victorian times, and it is how it still operates today. Those discharges are legally made and it is exactly how that system is designed to operate.”

Irrespective of any mitigating factors which pertain to some of the pollution incidents resulting from Thames Water’s activities, and regardless of the apparent legality of the discharges into the Thames, we are compelled to express our abhorrence of this legitimised pollution and the depressing attitude with which it is accepted.

16. A water company is, first and foremost, a business: if it is allowed to operate in a particular way, which is in fact damaging to the environment but at the same time perfectly legal and profitable, then we should not be surprised when it does so. This, in effect, creates a vicious circle. Many of the sewerage systems around the UK are old and dilapidated and would be enormously expensive to upgrade. If the water company also has what is tantamount to a ‘get-out’ clause because the system is operating as it was designed to do, even when this means sewage entering water-courses, what results is an environmental threat sufficiently intractable that no-one will tackle it head on. This is clearly unsatisfactory.

17. We were particularly concerned to hear that the problems caused by the age of the sewerage and drainage systems are exacerbated by the weather and by the increase in the development of land which has not been properly supported by improvements in infrastructure. With this in mind, the current prospect of so much new housing in the East and South East, possibly without any improvements to those systems, rings loud warning bells. When asked about the possible impact of climate change and increasingly inclement weather, Mr Sexton told us,

“The increasing intensity of short duration storms inevitably puts a load on the sewerage system. There are other factors as well. The urbanisation of London, with much less green areas for run-offs so that the water goes into the sewers and peaks so that it arrives at the same time, and the increase in population, are putting
increasing loads onto the sewerage system. It needs a lot of investment to make sure it is upgraded to what I believe is right and proper for the 21st Century.”

18. A debate in Westminster Hall on 18 January 2005 provided a very graphic illustration of this problem. Dr Vincent Cable, MP for Twickenham, was highlighting the problems caused by the seventy year old sewage works at Mogden. In fact, there are three problems caused by the works at Mogden, which are: noxious odours, mosquitos, and sewage overflow into the River Thames, particularly at times of high rainfall. These are, without doubt, dire and unacceptable by-products of the works and so it was particularly welcome to hear assurances from Elliot Morley MP, during the debate, that action was being taken. We welcome the news that Thames Water, working with Ofwat, have developed a business plan to upgrade not just the sewage works at Mogden but also the other three major works identified as significant contributors to the problem of sewage overflow into the River Thames.

19. However, the problem of sewage discharges and overflows into the Thames has been around for some considerable time and we would not want this, albeit welcome, work planned by Thames Water to be seen as the end of the matter. A combined study group, funded by Ofwat and including Thames Water, DEFRA and GLA, was set up in 2000 to consider the whole issue of sewage overflows into the Thames. It concluded early in 2004 that the best solution to sewage discharges and overflows into the river would be to construct a large tunnel or pipe, to be built under London and the Thames, and which would intercept overflows and divert them via existing treatment works at Beckton and Crossness. The cost of such a project was estimated at £2 billion, a figure that even five years ago we believe would not have been realistic. Whilst this is a significant sum, it is not impossible when set in context and compared against the turn-over of the water companies. The likely timescale for delivering such a project is also daunting with perhaps four to five years to agree a detailed design, acquire the land and gain planning permissions, and a further eight to ten years to construct the tunnel itself. However, according to Thames Water, the plan appears to have stalled awaiting a decision by Ministers.

20. Until the debate in Westminster Hall on 18 January 2005 it was not clear to us whether Ministers were currently giving any consideration to agreeing the plan. Referring to the question of what to do about the Thames tideway, Elliot Morley said,

“The working group examining the Thames tideway has been considering whether there are quicker and potentially cheaper ways of dealing with combined sewage overflows in the long term. In the end, there may not be and, in the final analysis, the tideway scheme may be the best option. I do not rule that out. I am waiting for the group’s report at the end of this month or the beginning of next month, and we will make an evaluation based on it.”

21. Whilst we now know that there is still some work being carried out on the Thames tideway proposals we are not particularly reassured that a decision will be reached in the
near future. There is no doubt that agreeing and then implementing a long-term solution to the overflow and pollution problems afflicting the River Thames is going to involve making some tough decisions and significant investment. What is also clear is that, whether the decision is for a tunnel under London, or something else, the status quo cannot be allowed to remain. The likely timeframe for action set out by Thames, which appeared to be confirmed by Elliot Morley during the debate on the 18th January, means that a decision with regard to the proposed plans for a tunnel under London to alleviate the threat of continued and increasing sewage and waste overflows into the Thames must be made as a matter of some urgency and we would expect the Government to be able to let us know the outcome of their deliberations by the time it responds to this report.

**Small and Medium-sized Enterprises (SMEs)**

22. Again using data from the “Spotlight Report” (this was confirmed by the Environment Agency at oral evidence session\(^ {20}\)), of 3.7 million-or-so businesses in the UK, 99% of them are small and medium-sized enterprises (SMEs).\(^ {21}\) Despite their size, SMEs appear to be able to pack quite a punch when it comes to making a negative impact on the environment. The Agency reported that, “[SMEs] are responsible for up to 80% of all pollution incidents and more than 60% of the commercial and industrial waste produced in England and Wales”.\(^ {22}\) The Agency was also able to shed some light on a possible cause for such poor environmental records amongst SMEs, stating that their research shows that, “70% […] or 75% of SMEs are not actually aware of their environmental obligations,” \(^ {23}\) and “the majority of these businesses are also not aware of environmental legislation.”\(^ {24}\)

23. The Agency’s assessment of SMEs’ general lack of knowledge with regard to their environmental obligations was not disputed by Mr Holbrow, Environment Committee Chairman of the Federation of Small Businesses (FSB), who, when asked about the poor environmental record of SMEs during an oral evidence session, said that, “although we do not condone breaking the law on these matters, a lot of it results from ignorance.”\(^ {25}\) We will return to the matter of what SMEs should be expected to know, what they know in reality, and who should be bridging that gap by informing and educating them, later in this report.

24. There might also be included here those companies who, either through failure to adequately train their workforce, or maintain their equipment or infrastructure, allow environmental crimes to occur. One only has to look at the “In Court” section of the

---

20 \(\text{Ev8}\)

21 The Environment Agency define a small enterprise as one which employs between 10-49 employees and a medium enterprise as one which employs between 50-249 employees.

22 “Greener business is good business, Spotlight on business, Environmental performance in 2003”, Environment Agency

23 \(\text{Ev10}\)

24 “Greener business is good business, Spotlight on business, Environmental performance in 2003”, Environment Agency

25 \(\text{Ev42}\)
ENDS Report\textsuperscript{26} to see that there are all too many examples of such incidents. In the September 2004 edition,\textsuperscript{27} for example, there is a case relating to a diesel oil pollution incident where the company concerned had failed to maintain an underground pipe, which was linked to a large storage tank, to the extent that the pipe had not been treated against corrosion and nor had there been any test made of the pipe’s viability since 1990. The result of this negligence was that almost 45,000 litres of fuel had escaped and polluted the ground water. The company was fined £20,000 and is paying for what is proving to be a lengthy and slow clean-up, with costs in the region of £350,000.

25. It would be wrong to conclude from this that all environmental crime committed by SMEs is as a result of ignorance and ignorance alone. Like all those who commit environmental crime, some SMEs will act negligently, and others deliberately, in ways which will be harmful to the environment and in direct contravention of their known legal obligations. Nor, for that matter, should we assume that all SMEs are acting unlawfully and without consideration for the environment. What is clear, however, is that a significant and unacceptable number of Small and Medium-sized Enterprises are responsible for an unacceptable level of environmental crime. It is incumbent upon all businesses, whatever their size, to insure that they operate within legal parameters.

\textbf{The deliberate offender}

26. Clearly, there are grey areas between ignorance and negligence and without being present when an environmental incident occurs, or the decision is taken to act in a particular way, it is very difficult to establish why the act occurred, let alone whether it was deliberate or not. This is one good reason why degree or extent of culpability is not weighed in most environmental crimes which are strict liability offences. There are, however, environmental offences which are clearly carried out deliberately, in full knowledge of the offence and the benefit to be gained from it. In our earlier report, \textit{Fly-tipping, Fly-posting, Litter, Graffiti and Noise}\textsuperscript{28} we reported that fly-posting was often seen as a cheap way of advertising, even if prosecuted and fined. However, during this inquiry the Sub-committee heard evidence from the Ministry of Sound in which it was made clear that the company was aware that by fly-posting they were acting illegally but that they had made a conscious decision to act in that way, not because they could not afford more legitimate means of advertising, but because, in their view, it was the most effective way of connecting with their customers. It was, they claimed, in the best interests of their business to continue to act illegally.

27. During the oral evidence session, the sub-committee was told by the Ministry of Sound’s Company Secretary and Director, Mr Richard Holman, that they had, “stopped fly-posting for record sales almost entirely some time ago, so we have been using this method of marketing essentially for events.”\textsuperscript{29} The company continues to fly-post to

\begin{flushright}
\textsuperscript{26} Environmental Data Service Ltd, www.ends.co.uk
\textsuperscript{27} The ENDS Report, No.356
\textsuperscript{29} Ev48
\end{flushright}
publicise events taking place in their London club and it does so for purely economic reasons as Mr Holman went on to explain:

“The reason that we are still using fly-posting in relation to club events is simply because of its efficiency. It reaches the market that we are trying to reach – lots of students, lots of young people. I am sure they do watch television some of the time but they probably do not take note of the adverts and probably do not read newspapers very much. They probably do not plan their lives very far ahead, so fly-posting that they see two or three days before an event is going to be more effective. It has just been the way that club events have been marketed, certainly in our case, for nearly 15 years.”

28. Leaving aside the rather depressing picture painted by the Ministry of Sound of its typical customer, the idea that young people do not watch television and are not influenced by advertising will come as something of a shock to all those brand names which do use television, and cinema, advertising to target their young adult customers. In this respect, the idea that the Ministry of Sound, and companies like it, are somehow compelled to fly-post in order to reach its customer base is nonsense. We are pleased to see the stronger tools proposed to be given to local authorities in the Clean Neighbourhoods and Environment Bill, especially those which allow local authorities to recover the costs of removing fly-posting (and graffiti—increasingly being used for commercial advertising) and which extend the graffiti removal scheme currently in place to fly-posting. We also applaud the increase in the size of the fixed penalty notice for fly-posting offences, although the level of fine could be raised higher still.

Resources

29. Generally, the evidence provided to the Sub-committee suggested that there were insufficient resources available to those agencies charged with enforcing current regulations. In their written evidence the Environmental Industries Commission (EIC) did not pull any punches when it said:

“EIC is concerned that the Government’s measures to stop companies polluting for free are being undermined in practice by failures to enforce the environmental protection policy measures that are in place. This is the message we receive daily from Members working on the front line of environmental protection. Whether it is the part IIA regime in the contaminated land sector; LAPC in the industrial air pollution sector; the Building Regulations in the climate change sector; or Oil Storage Regulations and discharge consents on the water sector; the message is the same: under-funded and inconsistent enforcement, coupled with derisory fine levels by the Courts, is undermining environmental policy objectives.”

30. The concerns expressed by EIC about “under-funded and inconsistent enforcement” have also been echoed by others. EEF, the Manufacturers Organisation, pointed to a
widespread resource crisis, claiming that, “The Environment Agency, the Scottish Environmental Protection Agency, Environment and Heritage Service and local authorities all face increasing pressure on their resources with the escalating volume of environmental legislation that is being implemented in the UK.” We will return to the matter of the level of fines and the increasing number and complexity of, in particular, EU Regulations, in later sections of this report.

31. We also received written evidence from the Environmental Services Association which, if accurate, we felt would seriously compromise the Agency’s ability to function effectively and deliver against all of its objectives. The ESA spoke of a cut of £4 million in the Grant in Aid (GIA) budget from DEFRA to the Agency for 2004/05. It is this money, ESA claim, which the Agency uses to fund policing and enforcement of illegal waste activity. This cut would come at the same time as the Comprehensive Spending Settlement commits the Agency to making efficiency savings of over £75 million.

32. During the oral evidence session the Agency was candid about the resource difficulties it faces. It admitted it was committed to achieving efficiency savings but that, “the bottom line is that the GIA for regulation which we get from DEFRA is not increasing, it is not increasing with inflation and there are still discussions on-going at the moment”. It is, of course, looking for alternative sources of funding but admitted that this was proving difficult:

“There is an issue here about resources and funding and we have been saying we need more resources, firstly for our own capacity on things like fly-tipping, illegal disposal, illegal dumping […] we are trying to get more resources. I do not know where it comes from. We are trying to get it through the landfill tax to some extent and we have support around the place for that, but nobody is bringing the money forward.”

33. Given that, according to Environment Agency figures, the number of substantiated environmental incidents is holding steady at around 29,000 a year, and that the vast majority of these incidents related to unregulated, un-permitted sites, it seems incredible that DEFRA would cut so dramatically the Grant in Aid funding to the Environment Agency. This decision must be reviewed quickly if the Agency is to continue to deal effectively with this important area of its work.

34. As part of its drive for efficiency savings, and in an attempt to eke out its reduced funding, the Agency is, it said, “directing [its] resources where the greatest priorities are.” To that end it has reviewed how it uses its existing enforcement officers and has now started to put them into special enforcement teams; there are currently twelve teams across eight regions. This adjustment appears to be paying dividends for the Agency and, using the Thames regions as an example, it told us that, following the creation of a special
enforcement team, prosecutions went up five-fold and fines imposed rose from a total of £20,000 to £100,000. The Agency is also looking at ways to work more effectively in tandem with local authorities. For instance, it stated that a new agreement was about to be concluded with local authorities which would further clarify the role of local authorities in dealing with the smaller incidents of illegal waste disposal and fly-tipping, leaving the Agency to deal with the larger and more serious incidents. **We commend the Environment Agency and the local authorities for continuing to work together and for developing a partnership which, if successful, may go some way to effectively handling incidents of illegal waste disposal and fly-tipping and look forward to seeing a review of the initiative in due course.**

35. The scope of this inquiry has allowed us only limited opportunity to establish exactly what resources are used by individual companies or organisations in actually trying to comply with environmental regulations, over and above that money they set aside to pay any fines they incur. Clearly, if we are being told by organisations, such as the FSB, that as far as their members are concerned, “environmental legislation is not top of their list,”36 it is not unreasonable to suppose that these companies do not spend much, if any, of their money on environmental compliance.

36. The water companies, however, do devote significant resources to try to ensure environmental compliance. Anglian Water, for example, say that they have spent £1.5 billion of capital investment in the water and waste sector in the last five years.37 This is a large sum of money and it would appear that at least some of that investment, combined with what Anglian Water refer to as their telemetry and instrumentation systems, has paid off. The Agency has acknowledged that, whilst still identifying Anglian Water as a repeat offender, the number of incidents involving Anglian Water were reduced in 2003 because they, and Wessex Water and Dwr Cymru, have “continued to direct management and operational attention at reducing their number of serious pollution incidents”.38 **We commend Anglian Water, Wessex Water and Dwr Cymru for reducing pollution incidents in 2003 and look for a similar commitment and achievement from all other water companies.**

**To comply, or not to comply?**

37. A constant theme throughout this series of inquiries into environmental crime has been the fact that, in many cases, the criminal justice system currently offers no effective deterrent. The likelihood that an offender will be caught is relatively slim. The penalties handed down, in the vast majority of the comparatively very few cases that make it to court, are derisory and in no way reflect the damage caused to the environment or indeed the cost of making good that damage.

36 Ev43
37 Ev30
38 “Greener business is good business, Spotlight on business, Environmental performance in 2003”, Environment Agency
The threat of detection and prosecution

38. Time and again over the course of our inquiries into environmental crime, it has been brought home to us that unless there is a real threat of being detected, the offender will continue to offend. We cannot stress strongly enough the importance of the threat of detection as a deterrent.

39. During an oral evidence session, the Federation of Small Businesses (FSB) provided some insight into one of the reasons why the threat of detection and prosecution is an empty one. Mr Holbrow told us,

“…not all cases are prosecuted, and there is a very patchy regime throughout the country from the Environment Agency. What happens in some cases would not occur in another part of the country, and we would like to see a more uniform approach throughout the country so that we do have a more level playing-field. We get members in one part of the country that will get prosecuted for doing the very same thing that occurs in another part of the country, and nothing happens.”

Mr Holbrow’s comments highlight the fundamental problem that if companies can see that either they, or their competitors in a neighbouring county, are unlikely to be detected and then prosecuted, they may be less inclined to devote time and money to ensuring compliance with environmental laws and regulations. The fact that there is a perceived inconsistency of approach employed by the Environment Agency in prosecuting environmental crime around the country is unhelpful and worrying and must be addressed by the Environment Agency as a matter of urgency.

40. Furthermore, a number of the memoranda provided to the Sub-committee expressed the view that the Agency was focusing on so-called soft targets, those companies which it already regulates and which, it would argue, are more compliant than those in the un-regulated sector. Anglian Water certainly makes this point in its written evidence to the Sub-committee when it describe itself as, “a point of primary focus for the Environment Agency.” This was echoed by ESA in its written evidence when they too argued that the Agency was not sufficiently focused on the right sector. We do not agree with the argument that certain sectors are in some way being singled out for harsher treatment than others simply because it is easier to do so; if an environmental regulation is being infringed then the Agency has every right and indeed a duty to act against the offender. Where we do have some concern is with regard to the fact that the majority of incidents are, by the Agency’s own reckoning, committed by those in the unregulated sector. This is not adequately policed and this imbalance must be addressed by the Agency and DEFRA

41. Of course, detection and prosecution, even when they work properly, are still only part of the answer, and if there is little chance that the offender will face a punishment which in any way dissuades him or her from committing the offence in the first place, not to mention re-offending, then that enforcement activity is a waste of time and resources. It is
a process which requires a linear approach, as Mr Walker of ESA explained well when he said:

“[The crime] needs to be detected, then prosecuted and then you need penalties in place. Key to all of that is having better levels of detection […] You could have much higher penalties, but if there is very little chance of detection, they are not going to act as a deterrent.”

Fines as a deterrent

42. The importance of the level of fine becomes even more apparent when applied to a corporate body if, as we have been told, many businesses currently see the payment of fines as the cheaper option to full environmental compliance, and even set aside funds for this purpose. The Agency was clear that this was a problem when it told us that, “the level of fines really is not sufficient to make much of an impact on the companies.” This sentiment was echoed by the Environmental Industries Commission in its written evidence when it said,

“Low fines send the wrong message in trying to create a culture where environmental compliance is taken seriously by industry. The experience of EIC members is that companies too often find it more economical to pay a fine than to properly address their environmental performance […] current fines for environmental offences are both too low and inconsistent […] they need to be dramatically raised to have a real economic impact and deter companies from polluting the environment”.

43. The disparity between the fines awarded, and the turnover of some of the companies involved, was starkly demonstrated by Thames and Anglian Water. Thames Water told us that in 2003 it accrued fines totalling approximately £70,000 but its turnover was in the region of £1.1 billion. Similarly, Anglian Water estimated that it had received fines of approximately £50,000 in 2003 and had a turn-over of some £750 million. These sums of money are as nothing when compared to the profits made by these companies. They also enjoy a monopoly in that their customers cannot vote with their feet and move to another supplier.

44. As we have already seen, the Ministry of Sound was very clear on the reasons why it no longer used fly-posting to promote its record releases: it was not because of fear of prosecution or a hefty fine. As Mr Holman told us, it was “not because of pressure from local authorities, but because it was not the most effective way of getting the message across to the public”. This statement was qualified later in the evidence session when Mr Holman conceded that the company had “cut back on our activity in fly-posting because it

41 Ev23
42 Ev12
43 EC4-06
44 Ev31
45 Ev49
has become a sensitive issue with the local authorities.” 46 Asked if fines were a deterrent in his company’s particular circumstances the answer was unequivocally no. Mr Holman went on to say that, “if there was a penalty regime that was being implemented quite strongly it would be a bigger incentive not to fly-post”. 47 Mr Holman was then asked whether, as a company director, he was concerned about the possible use against him or other senior members of the company of the lifestyle provisions of the Proceeds of Crime Act 2002, whereby all of an offender’s assets may be regarded as being the benefits of criminal activity. He thought this was a “fairly extreme penalty” and a “heavy reaction…only appropriate in cases of continuous failure to observe a more measured response”. 48

45. The Ministry of Sound is a perfect, but by no means unique, example of why, for certain companies, the current system and level of fines simply do not and will never work. It is sanguine about being contacted by the local council and being asked to remove illegal posters—it will, it says, act within 48 hours to get the offending articles removed. The current level of fine offers no greater threat and is without doubt insignificant to a business of its size. For the Ministry of Sound, and for many other companies, the bottom line is the bottom line, and, unless their profit margin is seriously compromised, then such companies are unlikely to take action to stop their illegal activity. When asked whether the company felt under any pressure to comply with environmental regulations, Mr Holman told us that the pressures were not very great:

“We are not a public company. It is not that Ministry of Sound is not high profile but we do not have quite the sensitivity of large companies with shareholders and there are not any City pressure groups. Clearly, we do not like paying fines and we always try to avoid paying fines if we can. If we are given 48 hours to get the posters down we get them down. Clearly, if we were being hit on the bottom line and our profit was being seriously affected by draconian penalties we might react more rapidly, apart from banning the whole thing, which is presumably where we might end up.” 49

For those companies and organisations who are not dissuaded from their illegal activity by the threat of detection, prosecution and sentencing, whether that be a financial penalty or, in a very few and extreme cases, a custodial sentence, other means have to be found to ensure their compliance with environmental laws and regulations.

**Alternative methods to ensure compliance**

46. There is no doubt that the Government’s aim must be to establish an effective system of detection, prosecution and punishment which will deter the environmental offender. We
have already seen that the threat of detection is, in some areas, barely a threat at all and that the current level of fines, by and large, makes for a woefully inadequate deterrent. The need for viable alternative options to ensure compliance with environmental laws and regulations is now of paramount importance.

47. We are aware that on 30 November 2004 DEFRA held a conference on Environmental Justice at which Elliot Morley, Minister of State, set out three priorities:

- to improve access to justice in environmental matters;
- to reduce the overall regulatory burden; and
- to consider more flexible options for dealing with environmental offences to make the punishment fit the crime.

Mr Morley went on to say, “data suggests that environmental crime is not punished to a degree that dissuades the callous or careless from offending. This sends out exactly the wrong signal to both industry and to the public that the law is soft on environmental crime.”\(^50\) The Clean Neighbourhoods and Environment Bill, which recently received its second reading, attempts to overcome this laxity in tackling local environmental crime. **We are reassured to see that DEFRA clearly recognises that the status quo with regard to how environmental crime is dealt with cannot be allowed to continue.**

48. We are particularly interested to see that DEFRA is considering using civil penalties “for offences that could lead to damage, but do not actually cause damage”,\(^51\) the idea being that this provides far greater opportunity to nip in the bud potential incidents before they become too serious and instigating action to make reparation. This would then allow the courts to deal with the more serious cases. **The creation of a robust civil penalty regime as an alternative means with which to deal with environmental crime is something we considered in our earlier reports and which, subject to learning more of the detail of the proposal, we would support.**

49. The creation of a civil penalty regime, as DEFRA has acknowledged, will not be easy. It is not clear, from what DEFRA has so far said about the civil penalty regime, who will be responsible for the day to day operation of the regime. It would seem likely that, unless an entirely new department is to be established, the day to day operations will fall to the Agency. If that is the case, then we have some concerns, primarily because of the resource issues currently facing the Agency, which we have already outlined earlier in this report. If a civil penalty regime is to work, and if it is to address what are recognised as the main problem areas populated by SMEs, which are currently un-regulated, significant investment is needed. **Given cuts in Grant in Aid funding for the Agency in the region of £4 million, and the additional requirement to make efficiency savings of over £75 million, any suggestion that it can assume responsibility for a civil penalty regime without a significant increase in funding will doom this initiative to failure.**

50 www.defra.gov.uk

51 www.defra.gov.uk
50. Another issue for the Agency may be its current practice of not issuing some of the more restrictive notices at its disposal because “business activity can be stopped or seriously disrupted by them.” As we understand it, the intention is for the Agency to have total discretion as to the level of fine applied under the civil penalty regime and, as we have already seen, getting this right is going to be absolutely essential if the penalty is to have any deterrent effect whatsoever. Whilst no one would wish to see a business fail, if the civil penalty is effectively without teeth then it is likely to fall at the first hurdle. It is important that the Agency is prepared to use a sufficient level of fine to ensure that the penalty regime works effectively both as a means of prevention as well as a cure.

51. There are other means by which compliance can be sought, some more successful than others and many more relevant to certain types of business than others. In 2003, the Agency prosecuted eleven company directors personally and it has also signalled its intention to look at the confiscation of assets through greater use of the “lifestyle provisions” of the Proceeds of Crime Act 2002. We support the Agency in its intention to make greater use of the lifestyle provisions of the Proceeds of Crime Act 2002. We cannot consider that the survival of a business which is a serial offender in environmental terms and shows no signs of wanting to improve its lamentable environmental performance should rank higher in terms of importance than the protection of the environment which that business desecrates.

52. A further option we explored during the course of the inquiry was whether or not “naming and shaming” a company, organisation or individual was an effective deterrent or punishment. This was definitely one of those measures that would be more effective with some companies than others. The Ministry of Sound, for example, explained that as a private company with no share-holders there was little pressure on them to comply with environmental laws and regulations. The nature of their business, based on youth culture and a reputation for being anti-establishment, also meant that they were not compelled by market forces to be compliant.

53. For the water companies, for ESA members, and for SITA, for example, the threat and impact of “naming and shaming” was a source of some concern. Although the water companies, with their “captive” market, will not see their customers falling away and switching providers, they were clear that being seen as an environmental offender was bad for business. In its written evidence, Anglian Water acknowledged that domestically it did not have to compete but it pointed to the impact on its international reputation:

“The UK water industry does not directly compete in the domestic market place […] however, many companies do compete in the international market place and domestic convictions are actively used against them to prevent the winning of contracts, regardless of the severity of the event.”

This was echoed by Thames Water during an oral evidence session where it highlighted a particular impact on business with the United States. The US has a very robust and long-
standing civil penalty regime, involving penalties which are in excess of anything we have seen in the UK. British businesses hoping to compete in the American market have a tough time if they have a poor environmental record in the UK, and Thames has described this as a huge deterrent for it. **We would urge DEFRA and the Environment Agency to consider how best to harness this tactic of “naming and shaming” corporate environmental offenders in the interests of environmental protection.**

54. Similarly, Mr Hjort, Managing Director of SITA-UK, was certain that a poor environmental record was a major concern for the shareholders of his parent company, Suez, and that it was one of the key indicators against which performance was measured. We find this very encouraging but we have to recognise that environmental compliance is not always going to be of paramount importance to every company board and all its shareholders. In fact, if the very act of compliance impacts on the bottom line of a company, it may be something that is positively discouraged. We touched briefly on the subject of Corporate Social Reporting (CSR) in an oral evidence session with the Agency. **We do not think it is unreasonable to expect businesses which are subject to environmental laws and regulations to complete an annual check-up of how they are performing against requirements; we see this simply as a natural progression which follows, if not accompanies, the introduction of a civil penalty regime. We would urge DEFRA to consider mandating such an assessment.**

**Education and publicity**

55. As with all of the preceding inquiries into environmental crime, it is clear that prevention is always going to be better than cure and a robust programme of education and publicity led by the Government is crucial to this being achieved. What we have seen in this inquiry has echoed our earlier findings in that successful communication of policy, new legislation and regulation is patchy.

56. We have seen examples of some very positive efforts being made to educate and inform businesses about their environmental obligations. In their written evidence the Law Society was generally positive about the Environment Agency’s “record with regard to those sectors and activities which it regulates in providing information on the best available techniques and making that information widely available”.

The “Spotlight Report” published by the Environment Agency, for example, is a very useful tool with which businesses can compare their performance against their competitors. The Agency also received praise for “NetRegs”, its website which provides what the Agency describes as “internet based guidance for businesses on environmental legislation and how to comply with it”. The information covers 100 business sectors and records in the region of 150,000 hits a month. NetRegs has been cited in a number of the memoranda provided to the Sub-committee as a very good source of information.
57. However, the Law Society was less impressed with the efforts of central Government. It used the so-called fridge mountain graphically to illustrate its view that Government is not doing a good job in educating and informing businesses of changes to regulations. It said:

“In general, Central Government has been deficient in not providing sufficient information for companies on environmental issues and, in particular, the matter of regulation. The Government tends to be slow in appreciating the practical implications of environmental legislation and regulation. The most obvious example is the failure to alert manufacturers, consumers and the waste disposal industry of new restrictions on the disposal of old domestic refrigerators. The result initially was stockpiles of old fridges[...]. Earlier action on the part of the Government in this instance would have avoided the problem.”

58. Without doubt one of the strongest messages we received from the evidence submitted was that in certain areas there is real concern with regard to what the ESA referred to as “the chaotic implementation of EU legislation, which means that there are opportunities for criminals to get involved in waste management”. This is a reference to the implementation of the EU Landfill Directive and one of its more significant provisions which was the end of co-disposal of hazardous and non-hazardous waste. This is by far the example most frequently used by those providing evidence to the inquiry. For many, and in particular those companies represented by the ESA and FSB, the implementation of this Directive has proved to be a frustrating and confusing experience. The Directive was signed in April 1999 and the ban on co-disposal did not come into force in the UK until July 2004. Despite what was a very long lead in time to this ban, three months before it was due to take effect there was still no sign of a communications strategy. In April 2004, a Parliamentary Question on this issue received the following response from Mr Stephen Timms, then Minister of State for Energy, e-Commerce and Postal Services in the DTI,

“Defra leads on hazardous waste and the Landfill Directive, but the DTI is assisting in the development of a communications strategy which will raise awareness of these issues among businesses through a variety of mechanisms and media. I understand that my colleague the Minister of State at Defra will be providing you with further details of the activities being planned over the coming months.”

59. The key words in this written answer are, of course, “development” and “being planned”. It cannot be acceptable for businesses to be left waiting an improbably long time for guidance on what for many were fundamental changes to their practices and procedures which could not be put into place in the time left to them. The debacle surrounding the implementation and publication of the ban on co-disposal of hazardous waste demonstrates all too clearly the failure of the Government adequately to engage with industry in a timely fashion. This must be addressed as a matter of urgency.

---

56 EC4-01
57 Ev20
60. We cannot leave the subject of education without drawing attention to what is, in fact, an absolutely fundamental problem underlying the whole issue of environmental crime, whether it is committed on a large-scale by a corporation fly-tipping or polluting, or on a small-scale by an individual who drops litter, causes noise pollution or participates in badger baiting. The vast majority of people, whilst not intending any harm to the environment, simply do not understand what environmental crime is and cannot link it to our own actions. Historically, there has been no formal or informal education on this subject and today’s children are not faring much better. We looked at how people are taught about Education for Sustainable Development (ESD) in an inquiry conducted in 2003, entitled Learning the Sustainability Lesson and we have revisited this subject in a Sub-committee inquiry, entitled, Environmental Education: a Follow-up to Learning the Sustainability Lesson. It is clear to us that until we have successfully embedded learning about the environment, and the impact of our actions on it, into our formal and informal education systems, we will continue to see both the business and the individual commit environmental crimes.

**Accepting Responsibility**

61. It is very clear to us that for far too many businesses environmental issues are simply not on their radar. Referring to the increasing number and complexity of environmental legislation, whether intentionally or not, the FSB could not have made the position any clearer when it said:

“The impacts of legislation and the requirements that new legislation places on individual businesses can be difficult to unravel. This is particularly true for small businesses that rarely have any staff member with dedicated responsibility for environmental issues or compliance. For the majority of businesses environmental issues are not a core priority and there is low awareness of environmental legislation that is relevant.”

62. The attitude demonstrated by the FSB might be understandable, acceptable even, if the environmental regulations with which businesses are supposed to comply were not mandatory. We see this attitude not only as evidence of the Government’s failure to get the environmental message across to businesses but it also speaks volumes about the prevailing attitude within many businesses. The inadequate level and poor timing of communication from central government is exacerbated by the mindset of some of the businesses concerned. **Without doubt, one of the greatest challenges facing the Government is to make businesses fully understand that they are as duty bound to comply with environmental regulations as they are, for example, with Health and Safety regulations.**

63. We have already heard that, according to Agency figures, as many as 75% of SMEs are unaware of their environmental obligations. The Agency also admits that, despite good

---

59 Environmental Audit Committee, Tenth Report of Session 2002-03

60 The Environmental Audit Committee appointed a Sub-committee on Environmental Education which is due to report its findings in March 2005.

61 EC4-12
initiatives such as NetRegs, the vast number of SMEs makes it very difficult for it to establish and maintain any useful contact with them, particularly as they are largely un-regulated. The Agency has, it told us, commissioned research into how it can communicate with SMEs and is also training staff at local level to “carry out advisory pollution, prevention and waste minimisation visits”.\textsuperscript{62} \textbf{Whilst we accept that it is early days yet with respect to the development and introduction of a civil penalty regime, we assume that an effective method of communicating with all businesses to whom the penalty might be applied must be a fundamental pillar of the structure of the regime. Failure to include an effective communication strategy into the system at the outset may lead to unforeseen rights of appeal being granted to those companies who might seek to demonstrate ignorance.}

64. We were also interested to hear about the respective Codes of Practice operated by the ESA and FSB and which apply to all their members. Quite obviously, in the absence of anything better and more centralised, organisations such as these are going to be key in both educating their members and getting information into the relevant businesses as quickly as possible. However, whilst ESA have what appears to be a robust Code of Practice which allows it to communicate effectively with its membership, but which also has very clear requirements for members to achieve and then maintain a certain level of conduct, the FSB Code of Practice and its method of communication did not appear as stringent. In their written evidence, FSB state that “there is significant scope for improvement in the communication of environmental obligations to business. SMEs need information and assistance on regulation affecting their business, particularly with regard to environmental education”.\textsuperscript{63} And yet, during oral evidence session, when asked about how FSB communicates important information to its membership, we were constantly referred to the FSB in-house magazine, which appears to be the main, if not only, tool used for this purpose. To rely almost entirely on an in-house magazine, which may or may not be read by those receiving it, is a very hit and miss approach to educating and informing a membership who need to know about fundamental changes which may impact on their business and we would urge the FSB to improve its communication strategy.

\textbf{Self-promotion}

65. The evidence we took from the Ministry of Sound raised some very interesting points about the conflict and contradiction between the need for new and innovative ways of publicising a business and the requirement to remain compliant with environmental obligations. Mr Gary Smart, Manager of the Ministry of Sound Club explained,

“Fly-posting is part of the whole network of club promoting. Clubs and sales have their own sub-culture, their own followers. They know where to see an advert; they know what they are looking for; they know what catches their eye. To promote a club night or an event there are only so many things you can do. You can place adverts in magazines, which are somewhat non-specific and a bit hit and miss. You can walk around all the cool shops and the clothes shops and leave bundles of
We cannot condone fly-posting under any circumstances, but we accept that some businesses do fall outside of the more traditional and accepted parameters for advertising. The Ministry of Sound did express some interest in some of the initiatives we saw when we visited Leeds during our inquiry into Fly-tipping, Fly-posting, Litter, Graffiti and Noise; we would encourage them to work with others in their industry, and the local authorities, to find alternative and authorised sites for poster-based advertising.

66. We have already seen that the Ministry of Sound does not have a particularly positive view of the type of person they seek to attract to their club using fly-posting; it is not a view we share. We choose not to subscribe to the idea that Britain’s youth are not environmentally aware, and cannot be “switched on” to more environmentally friendly ways of advertising. It could be that a company as high profile as the Ministry of Sound, and others in this area of business, is missing an important opportunity to lead the field on environmental issues in this sector. The Ministry of Sound has told us that it is already exploring the concept of text messaging as a method of publicising its club nights and we would encourage it and like businesses to pursue this and other innovative methods as viable alternatives to fly-posting.

Endnote

67. Without doubt, the one issue that links all four of our inquiries on environmental crime is that it is by and large not an issue which comes high enough on anyone’s agenda to rate any real attention or make any significant impact on behaviour. The Government’s pursuit of anti-social behaviour and the recent introduction of the Clean Neighbourhoods and Environment Bill are positive indications that these issue are now being taken more seriously, but, so long as the perception is that environmental compliance is still some way down the list of priorities for Government as a whole and its various agencies, then businesses will continue to view spending time and resources on complying with those obligations as time and resources wasted.

68. It is clear to us that more has to be done to target those businesses who commit the vast majority of environmental offences. Small and Medium-sized Enterprises are responsible for up to 80% of all pollution incidents and more than 60% of the commercial and industrial waste produced in England and Wales. These figures are troubling. The fact that the Agency currently has no effective way of communicating with SMEs, let alone adequately policing their activities is a contributory factor which must be addressed as a matter of urgency. The proposal for a civil penalty regime may go some way to addressing these issues but, as we have already stressed, this must be a fully rounded system which
provides for information and education, a clear threat of detection and prosecution and a realistic level of penalty which reflects both the severity of the damage caused and the cost of reparation, if it is to have any impact on reducing the incident of corporate environmental crime.

69. However, equally vital is the responsibility which must be borne by the businesses themselves, and in this we include not only SMEs but all businesses which have an obligation to meet the environmental laws and regulations pertaining to their sector of business. We have heard explanations for poor environmental records which have included ignorance, negligence, the inheritance of aged systems and, in some cases, even market forces which are felt to compel a company to act illegally in order to protect its investment. However, in the final analysis, whilst all of these reasons might explain the illegal act, they can never excuse it. **It is incumbent on every business to ensure that, as a matter of course, and not as an additional extra if there is the time and money, it and its employees not only know what its environmental obligations are but also comply with them.**
Formal minutes

26 January 2005

Members present:

Mr Peter Ainsworth, in the Chair
Mr Gregory Barker
Mr Colin Challen
Mr David Chaytor
Mr John McWilliam
Mr Simon Thomas

The Committee deliberated.

Draft Report (Corporate Environmental Crime), proposed by the Chairman, brought up and read.

Ordered, That the Chairman’s draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 69 read and agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That The Chairman do make the Report to the House.

[Adjourned till Wednesday 2 February 2005 at 3pm.]
Witnesses

Thursday 14 October 2004

Mr Ric Navarro, Director of Legal Services, Mr David Stott, Chief Prosecutor, and Mr Jim Gray, Head of Regulatory Development, the Environment Agency.

Mr Mike Walker, Director of Policy and Public Affairs, the Environmental Services Association, and Mr Per-Anders Hjort, Managing Director, SITA UK.

Thursday 28 October 2004

Mr Roy Pointer, Chief Executive, and Mr Clive Harward, Head of Water Quality and Environmental Performance, Anglian Water; Mr John Sexton, Managing Director of Thames Water Utilities Limited

Mr John Holbrow, Environment Committee Chairman, the Federation of Small Businesses.

Thursday 11 November 2004

Mr Richard Holman, Company Secretary, and Mr Gary Smart, Manager of the Ministry of Sound
List of written evidence

Advertising Association Ev55
Anglian Water Ev28, Ev34
Ash Parish Council Ev6
Clevedon Town Council Ev57
EEF – the Manufacturers Organisation Ev57
ENCAMS Ev58
English Nature Ev62
Environment Agency Ev1
Environmental Industries Commission (EIC) Ev65
Environmental Services Association (ESA) Ev20, Ev25
Federation of Small Businesses (FSB) Ev41, Ev47
Kimbling, Richard Ev68
Law Society Ev74
Ministry of Sound Ev48
Thames Water Utilities Limited Ev28, Ev39
Past reports from the Environmental Audit Committee since 1997

2004-05 Session
First Housing: Building a Sustainable Future, HC 135

2003-04 Session
First Annual Report 2003, HC 214
Second GM Foods – Evaluating the Farm Scale Trials, HC 90
Third Pre-Budget Report 2003: Aviation follow-up, HC 233
Fourth Water: The Periodic Review 2004 and the Environmental Programme, HC 416 (Reply, HC 950)
Fifth GM Foods – Evaluating the Farm Scale Trials, HC 564
Sixth Environmental Crime and the Courts, HC 126 (Reply, HC 1232)
Seventh Aviation: Sustainability and the Government Response, HC 623 (reply, HC1063)
Eighth Greening Government 2004, HC 881 (Reply, HC 1259)
Ninth Fly-tipping, Fly-posting, Litter, Graffiti and Noise, HC 445 (Reply, HC 1232)
Tenth Budget 2004 and Energy, HC 490 (Reply, HC 1183)
Eleventh Aviation: Sustainability and the Government’s second response, HC1063
Twelfth Environmental Crime: Wildlife Crime, HC 605
Thirteenth Sustainable Development : the UK Strategy, HC 624

2002-03 Session
First Pesticides: The Voluntary Initiative, HC100 (Reply, HC 443)
Second Johannesburg and Back: The World Summit on Sustainable Development–Committee delegation report on proceedings, HC 169
Third Annual Report, HC 262
Fourth Pre-Budget 2002, HC 167 (Reply, HC 688)
Fifth Waste – An Audit, HC 99 (Reply, HC 1081)
Sixth Buying Time for Forests: Timber Trade and Public Procurement - The Government Response, HC 909
Seventh Export Credits Guarantee Department and Sustainable Development, HC 689 (Reply, HC 1238)
Eighth Energy White Paper – Empowering Change?, HC 618
Ninth Budget 2003 and Aviation, HC 672 (Reply, Cm 6063)
Tenth Learning the Sustainability Lesson, HC 472 (Reply, HC 1221)
Eleventh Sustainable Development Headline Indicators, HC 1080 (Reply, HC 320)
Twelfth World Summit for Sustainable Development – From rhetoric to reality, HC 98 (Reply, HC 232)
Thirteenth Greening Government 2003, HC 961 (Reply, HC 489,2003-04)

2001-02 Session
First Departmental Responsibilities for Sustainable Development, HC 326 (Reply, Cm 5519)
Second Pre-Budget Report 2001: A New Agenda?, HC 363 (HC 1000)
Third UK Preparations for the World Summit on Sustainable Development, HC 616 (Reply, Cm 5558)
Fourth Measuring the Quality of Life: The Sustainable Development Headline Indicators, HC 824 (Reply, Cm 5650)
Fifth A Sustainable Energy Strategy? Renewables and the PIU Review, HC 582 (Reply, HC 471)
Sixth Buying Time for Forests: Timber Trade and Public Procurement, HC 792-I, (Reply, HC 909, Session 2002-03)

2000-01 Session
First Environmental Audit: the first Parliament, HC 67 (Reply, Cm 5098)
Second The Pre-Budget Report 2000: fuelling the debate, HC 71 (Reply HC 216, Session 2001-02)

1999-2000 Session
First EU Policy and the Environment: An Agenda for the Helsinki Summit, HC 44 (Reply, HC 68)
Third Comprehensive Spending Review: Government response and follow-up, HC 233 (Reply, HC 70, Session 2000-01)
Fourth The Pre-Budget Report 1999: pesticides, aggregates and the Climate Change Levy, HC 76
Fifth The Greening Government Initiative: first annual report from the Green Ministers Committee 1998/99, HC 341
Sixth Budget 2000 and the Environment etc., HC 404
Seventh Water Prices and the Environment, HC 597 (Reply, HC 290, Session 2000-01)

1998-99 Session
First The Multilateral Agreement on Investment, HC 58 (Reply, HC 45, Session 1999-2000)
Second Climate Change: Government response and follow-up, HC 88
Third The Comprehensive Spending Review and Public Service Agreements, HC 92 (Reply, HC 233, Session 1999-2000)
Fourth The Pre-Budget Report 1998, HC 93
Fifth GMOs and the Environment: Coordination of Government Policy, HC 384 (Reply Cm 4528)
Sixth The Greening Government Initiative 1999, HC 426
Seventh Energy Efficiency, HC 159 (Reply, HC 571, Session 2000-01)
Eighth The Budget 1999: Environmental Implications, HC 326

1997-98 Session
First The Pre-Budget Report, HC 547 (Reply, HC 985)
Second The Greening Government Initiative, HC 517 (Reply, HC 426, Session 1998-99)
Third The Pre-Budget Report: Government response and follow-up, HC 985
Fourth Climate Change: UK Emission Reduction Targets and Audit Arrangements, HC 899 (Reply, HC 88, Session 1998-99)
Oral evidence

Taken before the Environmental Audit Committee, Environmental Crime Sub-Committee

on Thursday 14 October 2004

Members present:

Mr Peter Ainsworth, in the Chair
Mr Colin Challen
Sue Doughty
Paul Flynn
Mr Simon Thomas

Memorandum from the Environment Agency

SUMMARY

The Environment Agency has previously submitted evidence to, and given evidence before the Committee on the manner in which courts deal with environmental offenders. The Agency’s role encompasses both the regulation and enforcement of company activity over a wide spectrum and also the activities of individuals who may have committed offences against environmental legislation.

The Agency has a broad range of criminal powers including formal prosecutions. Company structures can range from those of sole traders to multi nationals, but if the company has been registered in accordance with company law, then it can itself be prosecuted and held criminally liable for the actions of its employees (vicarious liability).

Specific legislative provisions also exist for the prosecution of senior managers for waste and water offences. However, the obtaining of convictions is dependent on proof of consent, connivance or neglect by such an officer, which can prove difficult to establish if the organisation has a complex structure or imprecise areas of responsibility.

The current criminal penalty against a company is the imposition of a fine. The Agency is dependent on courts sentencing appropriately. In general the Agency regards the sums imposed by courts as far too low to deter and suggests that guidance by the Court of Appeal or the Sentencing Guidelines Council is required.

Furthermore the Agency also recommends that new alternative and innovative forms of sentence are needed both to punish and change behaviour along with providing the Agency with the capability to calculate and impose civil penalties as are used most effectively by other regulators and in other jurisdictions.

In responding to the Government’s company law review, the Agency has also recommended that company directors should have a duty of care towards the environment in the same way that they have to their employees and customers. Also those details of environmental offences and environmental data should be disclosed in Stock Market listing documentation and the annual statutory reports and accounts so that investors and shareholders can judge if the directors are fit to run the company.

Currently of the Agency’s annual total of approximately 700 prosecutions about 40% are taken against registered companies:

— The number of substantiated environmental incidents reported to the Agency remains relatively constant at about 29,000 pa. The vast majority relate to unregulated, unpermitted sites. Of this number, approximately 1,300 are of the most serious Category 1 and Category 2 types where major or significant environmental harm has been caused and consequently are those most likely to attract a prosecution.

— Average fines for corporate offenders however have recently been falling. At £8,412 in 2003 the average is less than in 2002.

— Some serious offences have attracted large penalties. However many others have not and such variations would be reduced if guidance on tariffs were provided by the Court of Appeal. For instance it could be indicated that fines should take account of company turnover.

— It is considered that the ability to impose civil or administrative penalties on regulated bodies would be a most useful tool in the Agency’s armoury to deal with corporate offenders.

— The Agency considers that more imaginative sentencing options to deal with corporate offenders are also necessary.

— Increasing the possibility for the criminal liability of senior managers (especially Directors) would provide a powerful inducement for improved corporate performance.
1. INTRODUCTION

The Agency has given written and oral evidence to the Environmental Audit Sub-Committee on the issue of “Environmental Crime and the Courts”. A written submission was provided in December 2003 and oral evidence given in January 2004.

In the exercise of its enforcement and prosecution activities the Agency follows its publicly available Enforcement and Prosecution Policy and Functional Guidelines. It also adheres to the Crown Prosecution Service’s Code for Crown Prosecutors.

The applicable legislation does not differentiate between corporate bodies and individuals in so far as licensing, monitoring and enforcement are concerned. At law the company is a separate legal entity from its directors and shareholders and has a separate regulatory position. The directors and secretary are effectively the controlling mind of the company. A company can be held liable for the activities of its employees, but those same employees can themselves be responsible for acts or omissions, which may lead to pollution offences.

Specific provision for the personal liability of directors exists in some statutes which govern environmental liability eg s217 WRA 1991 and s157 EPA 1990 but proof is dependent upon the regulator obtaining evidence that the relevant officer consented or connived in or by negligence caused the offence.

Complex company structures and reporting lines can blur responsibility for individual acts, which may have led to an incident, and as with all other criminal offences the case must be proved to the criminal standard ie beyond reasonable doubt.

Interestingly, and by way of comparison, in Australian legislation (the Protection of the Environment (Operations) Act 1997), there is a presumption that Directors have knowledge of the acts or omissions of their company unless the contrary is proved, ie a rebuttable presumption is imposed.

2. THE AGENCY HAS ADDRESSED THE SPECIFIC QUESTIONS RAISED BY THE SUB-COMMITTEE

(i) Are there sufficient powers and resources to investigate environmental crime particularly in relation to corporate offenders?

(ii) Can prosecutions be mounted against those responsible as well as those committing the offence?

(i) The Agency’s powers to investigate and enforce are the same for companies as for individuals and consequently the provisions of the Police and Criminal Evidence Act 1984 and the general investigative rules and constraints apply, including adherence to the Code for Crown Prosecutors.

Powers exist to demand information from a company to assist with an investigation. However evidence obtained by statutory compulsion cannot be used against the provider. This position has been confirmed by Article 6 of the ECHR, which provides for the right to a fair trial and has been reaffirmed by case-law dealing with the issue of self incrimination.

(ii) As noted previously, officers of a company thought to be responsible can be interviewed in accordance with general PACE provisions. However difficulties exist in trying to establish the liability of senior managers in addition to that of the parent company due to the requirement of establishing guilt by consent,
The Agency has detected a change in attitude in some of the major operators in the water and waste industries. In general there is more challenge to the activities of the Agency, for example in refusing to provide representatives to attend for interviews and challenging legal definitions eg definition of waste. This may be in an attempt to avoid liability due to increased shareholder awareness of environmental responsibilities or because of the adverse impacts on costs and reputation that can follow from environmental convictions.

Where the evidence exists the Agency mounts prosecutions not only against companies but also against company directors. Directors have been handed down sentences of community punishment, fined and even sent to prison.

In the Agency’s report “Spotlight on Business Environmental Performance 2003” (published July 2004) it was reported that 11 company directors were personally fined sums up to £20,000. Fines for Directors increased on average by £2,000 from £3,000 to £5,000 over the previous year. Awareness by senior managers of possible criminal liability would undoubtedly assist in securing a company’s compliance with its environmental responsibilities.

In its response to consultation documents on Company Law Review the Agency has advised the Government that:

(a) Company Directors should have a duty of care towards the environment in the same way as they have to their employees and customers.

(b) Shareholders should know if company directors have been convicted and sentenced for environmental offences. This information should be disclosed in both Stock Market listing material and statutory Annual reports and Accounts so that a judgement can be made as to their fitness to run the company.

(c) A suite of core environmental data and trend information (on water and energy use; emissions and waste disposal) should be summarised in the Operating and Financial Review to enable shareholders to assess progress and make comparisons both within and across sectors.

(2) Are the penalties for corporate environmental offences adequate? If not, how can penalties and punishments be better targeted to ensure that the criminal justice system is effective in acting as a deterrent?

The Agency addressed the issue of the adequacy of penalties at some length in its previous submission to the Committee. The main problems are that courts deal with a range of offenders from individuals to multinational corporations charged with the same offences and must take into account their means when assessing the penalty. However it is difficult for courts, in the absence of tariff guidance, to know at what level to pitch the fine. Although the relevant factors to take into account are set out in the case of *R v F R Howe & Sons (Engineers) Ltd 1999 2 All E R* there is no suggested indication in the judgement of a financial starting point for the penalty other than the recommendation that the fine should be sufficiently large to bring home a message to shareholders. Also there is the difficulty for courts that due to the numbers of sentences (28,000 magistrates), when set against the number of environmental cases, they very rarely deal with Agency cases and so are unlikely to be familiar with or have an appreciation of the overall environmental sentencing background.

The Magistrates Association in its Guidance, “Costing the Earth” made available in 2003 to its 28,000 Members has provided helpful material and case illustrations to help ensure the imposition of realistic and consistent penalties. This would be enhanced even further by the nomination of individual magistrates and judges to deal with environmental case work.

Additionally the Sentencing Advisory Panel in its report, “Sentencing Advisory Panel—Advice to the Court of Appeal—Environmental Offences,” in 1999 specifically recommended that the sentencing of corporate offending should be reviewed (para 25) for instance to consider whether a company’s turnover or profitability should be a benchmark or a factor in the setting of a fine.

There has been a recent sentencing development under the provisions of the Criminal Justice Act 2003 namely Conditional Cautions. This is a provision whereby the Agency, once authorised as a “relevant prosecutor” by the Home Office, will be able to attach proportionate conditions to a formal caution. The use of such cautions is being piloted in several areas. Unfortunately at present such cautions will only be available for use with individuals and not companies, but would be available to use in relation to company officers. The application of this provision to corporate offenders would be of considerable use to the Agency.

Similarly the Agency made specific reference to the issue of deterrence in its earlier submission. Since then and as mentioned above, the “Spotlight on Business Environmental Performance of 2003” shows that fines are on average slightly less than the previous year despite the largest fine (£250,000 along with costs of £150,000) being imposed for a waste-related offence on CSG Ltd.

Indeed, the Agency considers that some companies do not regard the current level of fines as being a deterrent and it is possible that some budget for fines rather than for the cost of tackling the causes of pollution.
3. **What alternatives outside the criminal justice system should be considered for dealing with corporate environmental offences in order to reduce environmental harm by business? Should there be greater use of alternative means of punishment such as the use of prohibition notices, civil penalties and the confiscation of company assets?**

This issue was dealt with at length in the Agency’s previous submission.

3.1 **Notices**

The Agency has various forms of enforcement notice available, namely to suspend, prohibit or revoke a company’s licence or to prevent an activity which is liable to cause environmental damage. In 2003, 369 notices of differing types were served. Care is exercised in the service of the more restrictive type of notices as business activity can be stopped or seriously disrupted by them.

3.2 **Confiscation of Assets**

Under the Proceeds of Crime Act 2003 several convictions recorded against an offender may give rise to the application of the “lifestyle” provisions. This means that potentially all the offender’s assets may be regarded as being the benefits of criminal activity unless proved otherwise. The Agency is keen to use these provisions where appropriate and is hoping to do so in the near future.

3.3 **Civil Penalties**

As mentioned in the Agency’s earlier supplemental submission, several European countries use the technique of the regulator calculating and imposing a penalty. The capability has been examined in two specific studies. The Committee’s attention is drawn again to extracts forwarded previously from the report prepared by Michael Woods LLM and Professor Richard McRory CBE of University College, London entitled “Environmental Civil Penalties—A More Proportionate Response to Regulatory Breach”. The report was produced in 2003. The Report deals in general terms with the position in Europe, Australia and in some detail with the USA. Committee members’ attention is particularly drawn to Appendix B of the report, which specifies the current 11 UK regulatory bodies which have the capability of imposing this type of penalty.

Various methods of imposing civil penalties have been adopted. Germany in particular has made considerable use of the practice and the provision would provide a most useful additional capability for the Agency. Appeal provisions would be needed, but it could eliminate the expense of court proceedings and accelerate enforcement generally.

In Australia (para 4.13) the practice has been refined and formalised by incorporation into the Environment Protection and Bio-diversity Conservation Act 1999, and para 4.14 indicates civil penalties ranging from A$550,000 for an individual up to A$5.5 million for a corporation.

The practice of imposing civil penalties is used to the greatest extent and in the most refined way in the USA. It is based upon a deliberate attempt to reserve the criminal courts for offenders who deliberately, wilfully or recklessly fail to comply with environmental legislation and either cause or risk considerable harm to the environment. The method of calculation of the penalty is sophisticated and involves use of a computer system (known as BEN) to calculate the benefit gained by the offender from non-compliance. Similarly the capability of the offending company to pay the proposed penalty is also calculated by a computer system (known as ABEL) which provides information as to the sum that the company could afford without being put out of business. These methods of calculation are available to the offending company so that it knows the penalty that is likely to be imposed on it.

Additionally, the US Environmental Protection Agency also utilises what are known as “Supplemental Environmental Projects” along with the imposition of civil penalties (see para 4.20). Those projects, requiring polluters to undertake environmental projects, form part of the overall settlement that may be reached between the Regulator and the offender.

3.4 **Alternative Sentencing Provisions**

Thought has been given to other types of penalties, which are additional to administrative/civil penalties mentioned above. The ideas are embryonic but might merit the involvement of the Sentencing Guidelines Council. As details were provided in the supplemental evidence provided by the Agency following its last appearance before the Committee, the options are simply set out again at Annex 1.
Reducing emissions and waste can incur costs but business secures advantages from good environmental performance including savings, stakeholder perception and lower insurance risks. It also delivers greater benefits to business as increasingly investors look to environmental performance as an indicator of the “health and good management” of a company. For example, the European Commission in its report “The impact of Best Available Technique (BAT) on the Competitiveness of European Industry”, looked at the economic and environmental performance of the cement, non-ferrous metals and pulp and paper industries. It conclusively showed, on a range of different performance measures, that those companies operating to the highest standards were also the ones performing the best economically and were best placed to meet the future.

Using Regulatory Impact Assessments (RIAs) the Government considers business impacts when deciding whether or not to intervene in a market to bring about a desired policy outcome. The Environment Agency may contribute to the development of Government RIAs, although assessments of market conditions and impacts are largely made by Government.

The Environment Agency produces RIAs for its own major policy decisions that impact on those it regulates. Indeed it is compelled by legislation to take account of the costs and benefits when deciding whether to exercise its powers. This means that there is consideration of the costs that proposals impose on business and their impact on the competitiveness of markets. Companies have the right of appeal against such decisions but interestingly the rate of appeals is low.

However, environmental duties and responsibilities, generally in the form of domestic regulations, have been developed over time, which means that there is a lack of a common approach.

The Agency contributed to a Government review of legislation, which the Environment Agency enforces (final report published by Defra in May 2003). It considered whether increased harmonisation of the relevant provisions would improve protection of the environment and human health, and provide a simpler, more consistent and more streamlined approach for industry and the public.

Such an integrated approach would be the vehicle for delivery of the many new pieces of environmental legislation coming from Europe, so would not only reduce the current stock of legislation which industry faces but would stop it growing. However, the review concluded that it was not practicable to harmonise these regimes retrospectively, rather that the Agency and Defra should develop a graduated risk based approach to environmental regulation, which could be progressively applied to new or amended regulation. **Progress on this has been slow but the Environment Agency continues to press for an integrated approach including retrospective harmonisation of the major regimes where the benefits would be greatest.**

Are the laws and regulations applied uniformly across the business sector(s)?

The Agency applies the legislation consistently across business sectors. However it is increasingly adopting a risk-based and outcome-focused approach to the delivery of environmental regulation. This means that the Agency is not seeking necessarily to apply effort uniformly across sectors or companies, but rather to apply regulatory resource where it can have the greatest effect. The Agency has developed a Modernising Regulation Programme to drive the modernisation of its regulatory activities (eg risk-based approaches and tools) so as to deliver a consistent, proportionate, targeted, transparent and accountable approach as set out in the Better Regulation Task Force’s Principles of Good Regulation. Government has a crucial role to play in developing outcome-focused regulation and policy within an integrated and consistent framework.

Risk-based approaches enable the Agency to reward good performers and compliant businesses, reducing the administrative burden they face. They also allow the Agency to target effort at those sites and operators that pose the greatest environmental risk or are poorly managed so as to deliver compliance and bring about improved environmental outcomes. The Agency targets some of its resource to tackling illegal operations, so as to prevent freeloaders from undermining the competitiveness of responsible businesses.

The Agency welcomes and is actively engaged with the Hampton Review to explore opportunities for more efficient approaches to regulatory inspection and enforcement, while continuing to deliver excellent regulatory outcomes.

The Agency’s organisational structure enables it to develop policy, guidance and supporting systems and tools nationally, thereby allowing consistent regulatory approaches, which are then delivered through local operational teams, who can be responsive to local conditions and needs. Examples of this include the Agency’s Enforcement and Prosecution policy (available at www.environment-agency.gov.uk) functional guidelines, and its CCS and CIS classification systems which allow Agency enforcement staff to make firm and fair (consistent, transparent, proportionate and targeted) enforcement responses to incidents and breaches of permit conditions.
5. IS THE GOVERNMENT DOING ENOUGH TO EDUCATE THE BUSINESS SECTOR IN TERMS OF THEIR LEGAL OBLIGATIONS WITH REGARD TO ENVIRONMENTAL ISSUES WHICH IMPACT ON THEIR BUSINESS? IS THERE SUFFICIENT DIALOGUE AND CO-OPERATION ACROSS GOVERNMENT AND THE BUSINESS COMMUNITY TO ENSURE THAT BEST PRACTICE FOR EXAMPLE CAN BE SHARED?

5.1 Corporate Awareness

The provision of advice is an important component of the Agency’s approach to delivering modernised regulatory services to business, and central to its aim of securing high levels of compliance with environmental regulation.

The Agency provides advice in a range of different ways to business.

(i) Businesses that we directly regulate through the issue of permits

Advice is provided to businesses on new environmental regulations such as the Pollution Prevention and Control Regulations (PPC) through:

— Regular liaison meetings with key Trade Bodies.
— Formal consultations on Agency regulatory procedures.
— Joint discussions and consultations on the technical standards that will be applied by Agency Inspectors such as Best Available Techniques to minimise emissions to air, land and water.
— Sector based workshops, training and conference events.
— The provision of sector based information containing all the key documents required by applicants to make a successful permit application.
— Pre-application discussions to ensure businesses are aware of our requirements. Initial discussions are offered at no charge, more extensive discussions are covered by charges.

(ii) Businesses not directly regulated through the issue of permits

Most businesses in England and Wales are not directly regulated by the Environment Agency through the issue of permits or registrations. Most of these businesses are Small and Medium Sized Enterprises (SME’s) who make up over 99% of the 3.7 million businesses within the United Kingdom.

These businesses collectively have a major impact on the environment. They are responsible for:

— Over 50% of pollution incidents.
— More than 60% of the commercial and industrial waste produced in England and Wales.

They produce more waste, over 40 million tonnes, than Local Authorities collect as municipal waste. Yet recent surveys by the Agency indicate that 75% of SMEs did not believe their business had a negative impact on the environment. The majority of these businesses are also not aware of environmental legislation.

Because of the impact SMEs have on the environment the Agency has developed a strategy to target improvement in their environmental performance. Key strands to this programme are to:

— Improve their environmental awareness.
— Provide clear, readily understandable information and support.

Initially it was decided to target seven high-risk business sectors including agriculture, construction, food and drink, manufacturing of metals, manufacturing of organic and inorganic chemicals, paper and wood and textiles.

This work relies on a mixture of non-regulatory and regulatory approaches and is undertaken through partnership with businesses, trade bodies, other regulators and Government funded programmes such as Envirowise and Non Government Organisations.

Typical initiatives to date have included:

— NetRegs—the provision by the Agency of internet based plain language guidance for businesses on environmental legislation and how to comply with it (currently covering 100 business sectors). There is a steady rise in usage with 150,000 hits a month. It plays a major part in the DTI’s business.gov programme and is funded through the Treasury Capital Modernisation Scheme.
— Targeted campaigns and programmes.
— Production of joint Voluntary Codes of Practice.
— Joint voluntary operating agreements with major multi-site operating companies to reduce the risks of pollution incidents as a result of agreed and targeted capital investment programmes.

Such initiatives have resulted in significant reductions in some pollution incidents. They have also been important in gaining consensus with industry about best practice to tackle illegal activities and the need for additional regulations where a “level playing field” cannot be achieved by voluntary measures.
The Agency has limited and reducing funding from Grant in Aid for this advisory work to business. Major projects are only possible by building partnerships with business and through identifying other external funding sources.

It remains a significant challenge for the Agency to attract funds for this work against competing demands as new environmental legislation is enacted in the UK and funds are increasingly tied to permitting regimes.

The Agency is also aware of the reluctance of some SMEs to approach it for advice. As a result the Agency has commissioned research into how it can best communicate with them and is endeavouring to establish closer links and regular meetings with the Small Business Service (part of the DTI) and the SME Sector Groups. Specific Agency staff are also being trained at local level to carry out advisory pollution prevention and waste minimisation visits. By this means it is hoped that the potential for offending with its consequent costs can be reduced.

Finally the Agency also offers an extensive library of advice, much of it devised in association with business. The Agency has a Pollution Prevention and Waste Minimisation Process team who are responsible for publications which are generally available to both industry and SMEs, for example the Agency Pollution Prevention Guidance Notes, which are available free of charge. These notes provide sector specific guidance as to the risks and responsibilities associated with particular activities. They are identified on the Agency’s website and there is usually a Faxback service available for enquiries.

In addition the Agency works with industry to draw up best practice guidance notes, which are designed to assist industry in identifying the types of processes and standards which will be required for the most potentially polluting processes.

6. THE WAY FORWARD

With particular regard to corporate offenders the Agency would welcome the following provisions:

— Sentencing guidance for courts on how to assess fine levels due to the different sizes of corporate offenders.
— Nomination of specialist Magistrates and Judges to deal with environmental casework.
— Regular training for those nominated.
— Creation of a range of alternative sentencing provisions.
— The applicability of Conditional Cautions to corporate offenders.
— The capability to assess and impose civil penalties.
— The requirement that companies must provide representatives to be interviewed.
— Progress on harmonisation of regulatory regimes.
— Continuation of funding for the NetRegs programme and for other advisory work.

September 2004

Annex 1

Alternative Sentencing Provisions

Equity share issues—Such a penalty would enable a court to order a company to issue shares for a specified sum related to the avoided costs or the benefits obtained through the commission of the offence. Failure by the company to do so would lead to the company being re-sentenced for the offence. The creation of additional shares would affect the holding of other shareholders thus making them concentrate upon and demand changes in the practices of the company. Such a sentence would mean a company would not have to pay an immediate fine thus preserving its cash flow. It would however affect its valuation.

Corporate Rehabilitation Order—This would be an order made by the Court for a specified period (possibly two years), during the course of which the company would have to undertake specific activities and actions. A range of those activities would have to be designed but could, for instance, include training of personnel in environmental matters; adoption and implementation of environmental action plans; remediation of environmental harm to the satisfaction of the Agency; Compliance would be monitored by the Agency but could be attained by the placing of an Agency representative on the company’s Board for the duration of the Order. Failure to comply with the specific activities would lead to the company being brought back to Court to be sentenced in an alternative way.

Community Projects—Here the Court would have the power to order an offender to complete a project to the value of a specified sum related to the harm or benefit that had been obtained by the offender. This project would have to be completed within a specified period. The project would be linked to environmental improvement. This provision would also be capable of application to individual non-corporate offenders who might not be in a position to pay a high fine. Not infrequently the Agency encounters such individuals who may well have caused considerable environmental and amenity damage through fly-tipping for instance but who are not in a position financially to pay an appropriate fine. The ability of a Court to make this kind of order would help to rectify that problem.
Remediation Orders—Although there is power to serve a works notice requiring remediation currently available to the Agency under s161 Water Resources Act 1991, no parallel power exists for either the court or the Agency in relation to the commission of waste offences. An order as part of a sentence, requiring an offender to remediate environmental harm to the satisfaction of the Agency and within a specified time would be extremely valuable especially if non-compliance with such an order was in itself made an offence, and the offender capable of being ordered back to Court so as to be re-sentenced for the original offence.

Corporate Bonds—this is a suggested provision whereby a corporate offender either pays funds into a Court account for a finite period or is ordered to obtain compulsory insurance to a specific value. The amount ordered would be dependent upon a Risk Assessment of a company’s potential for causing environmental damage. The offender would pay for that assessment to be done. Once the assessment had been made then the bond would be in an appropriate sum and for a specific period and would make funds available for use by the Regulator should environmental harm be caused during that time so as to remediate any damage. This would be of value where there was a perceived risk of the possible liquidation of the company concerned.

Adverse publicity orders—a suggested provision whereby in addition to any sentence imposed, a Court could make an order that a notice (with wording agreed by the Agency as to the offence and its circumstances) be placed in the local or even national media within a specific time. Non-compliance would in itself be an offence. Furthermore, the provision of the order could be extended to compel an offending company to place that notice in its statutory annual report and accounts so that its shareholders and customers were aware.

These are ideas that require analysis and detailed scrutiny. Given the particular difficulties of sentencing environmental offenders—especially corporate offenders—it is thought to be a worthwhile exercise that would provide courts with a more far-ranging and effective form of sentencing regime that would help to ensure compliance.

Witnesses: Mr Ric Navarro, Director of Legal Services, Mr Jim Gray, Head of Regulatory Development and Mr David Stott, Chief Prosecutor, Environment Agency (EA), examined.

Q1 Chairman: Good morning, welcome, thank you very much for coming along to this Committee, some of you not for the first time and we are very grateful to you for your time. This is the first session in our new inquiry into corporate environmental crime and we are very pleased to have the Environment Agency in at the beginning, as you obviously have a key role to play. Thank you also for your memorandum, which we have read with interest. I note from that, that you state small- and medium-sized enterprises make up 99% of all business, are responsible for 60% of the commercial and industrial waste and a significant number of incidences of pollution. Is not one of the problems that you have got that that sector is really hard for you to get to grips with, because you have licensed companies which are obviously quite easy to regulate and you have this huge other lot which is getting on with all sorts of things that you have no real kind of handle on?

Mr Navarro: That is certainly true. The SME sector is responsible for over 50% of pollution incidents, as well as that 60% figure of waste arisings, which we manage. This is a very large and diverse sector and, as you say, we do not have a direct contact with that sector. Very often, the first time we come into contact with SMEs is when they have committed an offence which has had an environmental impact and that is how they come to our attention. It is a difficult whole range of sectors to deal with, it is a difficult problem for the Agency, who are trying, for example in terms of producing the NetRegs, (which I am sure Jim Gray can talk about), but designed to provide very user-friendly easy advice to over 100 sectors of SMEs. The hit rate on that is increasing. I think we are getting 150,000 hits a month, but nevertheless it is a big challenge for us. Jim, would you like to say anything?

Mr Gray: Yes. The NetRegs have been very successful. The figure I have in mind is that we have had about 1.5 million hits a year. It is a number of things with SMEs: there is obviously just the huge number and we do not have contact with most of them in the regulatory sense. What we are trying to do though, is target sectors, sectors like agriculture, illegal activities, fly-tipping et cetera and construction; so there is agriculture, construction, food and drink. What we are trying to do is to identify the higher impact sectors and to target those, influencing them and dealing with trade associations.

Q2 Chairman: How often do you meet with the trade bodies?

Mr Navarro: We have quite a lot of contact generally with the trade bodies of the industries that we regulate. We have fairly extensive contacts with CBI and ESA who are behind me today. When it comes to SMEs, it is difficult to find trade associations which deal collectively. There are some sector bodies—

Q3 Chairman: Do you meet, for example, with the Federation of Small Businesses?

Mr Gray: Yes, people like that and the Small Business Service. We tend to deal with about six or seven, but some of the larger trade associations also have SMEs, such as the Surface Engineering Association, EEF; a number of larger trade associations also target a lot of SME interests and membership. Coming back to the campaign type and targeting the sectors, we either target sectors, or we have pollution prevention type campaigns: things like oils, tyre disposal, and of course hazardous waste has been quite a large campaign where back in
July we were getting 500 enquiries a week at the time of the co-disposal ban. During the communication of hazardous waste information, a lot of trade associations were involved there and they would then be targeting their members.

Q4 Chairman: When you talk about targeting, you are targeting them with information basically, are you not?
Mr Gray: Yes, information.

Q5 Chairman: It depends, therefore, on them to be willing to be engaged. It is therefore self selecting, because you know the good guys who are the people who are going to engage with you and the people who are causing the difficulty are not going to pick up the phone and say “Hello, can I speak to the Environment Agency”.
Mr Gray: That is true.
Mr Navarro: That is true and one of the challenges of the trade bodies themselves is engaging with the whole of their membership. We talk to the NFU for farmers, but that does not mean necessarily that they are in touch with the whole of their 162,000 farmers. We need to try and influence all those farmers in order to deal with problems like diffuse pollution and minimising waste and reducing run-off and all that sort of thing. It is quite difficult.

Q6 Sue Doughty: I am very interested in this and particularly when we talk about the worst offenders, we are talking about people, for example, taking construction waste away. We have been concentrating on prevention, but when I met my farmers a couple of weeks ago, they were reporting things like lorry loads of asbestos on their land; not only that, but when they tried to get it investigated, they were told “Well the lorry has just changed hands, we could not track the owner”, a lot of reasons why not. So although on the one hand I take your point, for example, about farmers being told what is required of them, when they are the victim it seems that the investigation is somewhat cursory and then they are left with the problem of disposing of a whole lot of asbestos or whatever else it was in this case. It is worrying.
Mr Stott: That side of things, the large-scale disposal of the type that you are talking about, will come up later on in the discussion about the special enforcement teams that we have put together and which are going to target specifically that sort of activity. That is not unsophisticated and there are significant evidential problems for us, because a lot of vehicles which are used are registered in names that we simply cannot track down; they pass between various people and different hands who use them, so they are difficult operators to pin down. We are going to need and we will get, police cooperation. We must start to have more of a joint effort in operating against that sort of activity, but we are very conscious that that is a fertile field for us to get into. We have not, to date, really been structured to deal with that scale of operation, but we are now getting to grips with it.

Mr Gray: There is a question of resources; we would like more resources to be able to have the capacity to do more of this sort of work and also to assist the local authorities, and to assist them to build capacity as well for this type of enforcement work.

Mr Navarro: There is a problem, because that is funded from GIA, which is tending to reduce. Our effort in relation to that completely illegal unregulated sector needs to rise commensurate with the problem, but we are faced with a sort of squeeze in terms of the resources which we can actually apply to it. We are trying to think of new sources of funding, maybe some diversion from the landfill tax or other sources which we could then apply. Basically it is quite difficult to catch these people, they are sophisticated in the main and the effort we need to track them down and then we need better powers when we do catch them.

Q7 Chairman: Coming back to the division between how you deal with SMEs and bigger licensed businesses, what do you say to the accusations, which we frequently hear, that you devote an awful lot of time to dealing with the big businesses which are basically grown up and are well behaved and they get fed up with being regulated, when they can look out of their window and see a whole lot of other stuff going on which you have nothing to say about? Is that not unfair?
Mr Navarro: We would not accept that that is the position. We regulate and you know that we are doing a lot—and I shall ask Jim to talk about the modernising of our regulatory approach—to lighten the touch on responsible industry, who, at the higher end, are going beyond the compliance with our permits, because for competitive reasons and sustainability reasons they are looking beyond that. So we are coping with that end down to the lower end of regulated companies which still require quite a lot of physical regulation to keep them up to the mark and then dealing with the unregulated sector. We do have various tools which we have developed to target our efforts, like OPRA.
Mr Gray: Just a few initial comments. I hear this comment a lot from operators who are regulated saying we go for soft targets and not the real illegal people. Yet when we say “Well, tell us where they are, give us the names and we will go to see them” . . . It is something people say, but we do not get names and addresses or anything given to us; occasionally we do, but it is not that often. Usually, forensically, we have to find these sorts of people ourselves and it takes a lot of resources. There is an issue around using the money we get for regulating the people who are licensees, because they pay us charges to regulate them. It varies: some of them complain, some of them are supportive. I know ESA, behind us, are very supportive, but some companies would not like us to use the money they pay for other purposes. So there is an issue about charges. What we are trying to do, perhaps to get round it another way, is to try to target unlicensed activities rather than illegal activities and stretch the charging scheme towards the unlicensed category. I think our
ultimate challenge, what I would say, is send us the addresses and the evidence. Is that fair comment, Ric?

Mr Navarro: Well that is certainly true. Within the regulated sector we have tools to target our efforts on the ones who are not complying or who require more regulatory inspection in order to require them to comply as opposed to the more compliant, more responsible industry. We do have those tools and those are reflected in the charges that we actually apply. So there is some incentive there under our operator risk appraisal system.

Q8 Chairman: You say in your written evidence, that you issued 369 enforcement notices last year, but that you are careful, for very good reason, not to be unduly restrictive because you could actually close a business down. Under what circumstances would you contemplate issuing a notice which you knew would have the effect of shutting the business? Have you ever done it?

Mr Stott: It is very rare.

Mr Navarro: We have very rarely issued prohibition notices under the IPC/PPC regime and we have actually a duty to issue a prohibition notice where there is an imminent risk of serious pollution of the environment, so there is no real discretion there.

Q9 Chairman: As you said earlier, it is very difficult to identify that risk. You usually come across instances like this when the pollution has already occurred.

Mr Navarro: We are dealing here with regulated industry, where we do inspect and if we come across, or have brought to our attention, a situation where there was a risk of imminent pollution, we would issue a prohibition notice to require that process to stop, in order to safeguard the environment and public health. However, in practice, very rarely do we actually have to use that sanction and most of the enforcement notices that you have referred to are notices requiring companies to take action, to come into compliance with the obligations which they have already signed up to in the sense that they accepted their permit conditions.

Q10 Chairman: Could you possibly drop us a note, setting out the number of prohibition notices you have issued over the last five years?

Mr Navarro: Yes, we can do that.

Q11 Chairman: I think that would be very helpful. Coming back to the last point you were making, how do you actually measure compliance?

Mr Navarro: We have a number of tools in order to do that. We have compliance assessment programmes and we provide guidance to our staff on the measures which they ought to be looking for when they go to visit a site.

Q12 Chairman: So it is relatively straightforward: you issue a notice and you give a certain amount of time for the compliance to be effected and then you come back and make sure that is has been done.

Mr Navarro: Yes.

Q13 Chairman: Do you come back again and again afterwards?

Mr Navarro: Of course. I think we are talking about compliance with the enforcement notice or compliance generally. On compliance generally, we visit sites in order to ensure that the companies or the operators are complying with the conditions of their permit and we target the amount of inspection according to various factors, such as the record of the company, the risk of the operation which they are undertaking. So there is targeted inspection. Of course, if we find that a company is not conforming to their conditions, that argues for us needing to go back to look to see whether they are improving in the future. So they will attract more inspection effort.

Q14 Chairman: Do you measure your own effectiveness too with the compliance classification scheme?

Mr Stott: That is right, the CCS, the compliance classification scheme, which has been in since April overall. The data really is too raw, only six months so far, to develop any form of trend, but that is the whole point: to capture the types of breaches, classification one to four and then to take action if we see a trend developing of certain types of breach with a certain company.

Q15 Chairman: And so far, so good with that?

Mr Stott: Yes; it is going extremely well.

Q16 Chairman: One final question from me. What feel do you have or maybe data on how many of the offences committed by small- and medium-sized companies are committed deliberately and how many are committed as a result of ignorance?

Mr Stott: We have no formal data on that. As you know, the regime generally is one of strict liability, once pollution has been caused, then an offence has been committed. Whether it has been committed deliberately, negligently or with gross recklessness, we have no way of actually measuring.

Mr Navarro: We do know from our research that 70% of SMEs or 75% of SMEs are not actually aware of their environmental obligations, so we are starting from a low base. Then when we come across an incident of course, in those circumstances we would be able to judge whether that had been committed negligently or recklessly or deliberately or unfortunately through ignorance.

Mr Stott: In the data the average fine is about £8,000 or so. It is of course easy to say in mitigation “We simply did not know”. A lot of companies would say “We simply did not know that we had this particular obligation”.

Q17 Chairman: I am surprised that you said you had no way of telling whether an offence had been committed negligently or deliberately.
Mr Stott: I beg your pardon—no data.

Q18 Chairman: You have no data.
Mr Stott: I have no data to that effect.

Q19 Chairman: Yet it must be a factor—
Mr Stott: In presenting the case.

Q20 Chairman:—in your subsequent approach, whether to adopt enforcement measures or prosecution or whatever.
Mr Stott: Yes; I am sorry I simply cannot give you figures as to how many were intentional and how many were caused by gross negligence for instance.

Q21 Mr Thomas: In your memorandum, you have said that the Agency has detected a change in attitude in some of the major operators in the water and waste industries and I take it clearly that is an attitude change for the worse. Which companies are you referring to?
Mr Stott: The ones that spring to mind which probably led to that insertion are the water companies where we have certainly had a change in attitude towards our enforcement activity, for instance instructions to employees not to cooperate initially with our enquiries, also a failure to provide us with their explanation as to the causation of pollution incidents. There has been a change from how it was some time ago.

Q22 Mr Challen: We have round about nine or ten major water companies. Is it all of them?
Mr Stott: It is two in particular.

Q23 Mr Challen: Two in particular? Do the others manifest this behaviour as well?
Mr Stott: Not to the same extent as the two of them which provoked that comment.

Q24 Mr Challen: Which are the two in particular?
Mr Stott: Probably Anglian and Thames are the ones that we have had specific problems with.

Q25 Mr Challen: Any special reasons why you think they might be doing this and not the others to the same extent?
Mr Stott: No, I could not say.

Q26 Mr Challen: But the others might look at the experience of those two and say “They have been quite successful here because they have batted off enquiries”.
Mr Stott: No, I did not say that. We will fight to the end.
Mr Navarro: To some degree there is a growing trend that as we are more successful in raising the stakes in terms of reputation and financial consequences from our enforcement activity and by publications such as Spotlight, where we try to influence the City and business, having raised the stakes on that side, it is inevitable that companies are going to have a stronger response and try to avoid the consequences, because they do not want to have the stigma of prosecution and the economic consequences which might follow. We know that OFWAT for example, in the water industry, take account of the enforcement record of the water companies. In a sense, it is working because the financial pressures are starting to bear on the companies and therefore they are more combative in terms of our enforcement.
Mr Stott: I think there may be a contractual aspect as well, for when they are bidding for contracts abroad.

Q27 Mr Challen: I am glad there is a reputation element, because they are our monopolies basically, are they not? What real damage will they suffer? You say in the memorandum, for example, in terms of the change of attitude, “In refusing to provide representatives to attend for interviews and challenging legal definitions”. It seems as though they want to run rings round you.
Mr Navarro: Yes.
Mr Stott: Well, they may want to try to do that, but I think the reality is different.

Q28 Mr Challen: A lot succeed.
Mr Stott: They have succeeded recently, but that is not the end of the game.

Q29 Mr Challen: Is that because their methods of doing this are getting more sophisticated?
Mr Stott: It is taking it to the nth degree, where there was probably common acceptance, say of the definition of what treated sludge was for instance from the water industry—

Q30 Mr Challen: So how are you responding to this new challenge, this new aggressive behaviour of these water companies?
Mr Stott: We follow the guidelines, we follow the directive routes that we have, we will persist.

Q31 Mr Challen: Would you like more powers and what powers might they be?
Mr Stott: I do not think that is the main problem that we have: it is simply that we have to be more aware of the interviewing techniques that we should adopt, in the evidential gathering that we adopt, that we cannot take anything for granted, which is probably right. I am not saying that it is a problem, but it does create delay, it creates more effort, more time in putting cases together. In terms of demanding interviews etcetera, they have a right not to be interviewed, which is a right that everybody has. I do not think we want to change that; we simply have to be more efficient and slick in putting our cases together.

Q32 Mr Challen: If somebody refuses to be interviewed and face your inquiry—
Mr Stott: That does not help, that is right.

Q33 Mr Challen: It does not help you and it does not help the environment either, I suspect.
Mr Stott: No.

Q34 Mr Challen: Are there ways that you can publicise the fact that you have not had cooperation from a company? Is that not another kind of sanction?

Mr Stott: We certainly could, yes, and we would say so in court.

Mr Navarro: And this is a factor which we would take into account in our enforcement and prosecution policies: the attitude of the company is either an aggravating or a mitigating factor. Of course the other difficulty we have generally, as the Committee well knows, is that the level of fines really is not sufficient to make much of an impact on the companies. We would be looking for a different approach, so that in imaginative ways maybe we could bring transgressions more to the attention of shareholders and try to get the range of pressures on the company to conform.

Q35 Mr Challen: Moving on to the issue of fines, we mentioned earlier this morning the Spotlight on Business Environmental Performance document published in July this year, where it was reported that 11 company directors have received fines, personal fines that is, up to £20,000. You also suggest that some companies have separate budgets to deal with fines. I do not know if you would care to mention which companies, a handful of those, do have such budgets. Can these budgets also be used to pay off the directors’ personal fines, to your knowledge?

Mr Stott: Actually that would be an offence in its own right for somebody else to pay your fine. I am not talking about environmental law; that is the law generally. I am not aware that companies are actually budgeting for that.

Mr Navarro: If a company has its own budget to cover its own fines, then obviously if a company is fined, the company has to pay. Do you know if that is tax deductible just out of interest?

Mr Stott: I do not know.

Q36 Mr Challen: If a company has its own budget to cover its own fines, then obviously if a company is fined, the company has to pay. Do you know if that is tax deductible just out of interest?

Mr Stott: I do not know.

Mr Navarro: I should not have thought in a public policy sense that would be tax deductible, but we could look at that.

Q37 Chairman: Is it possible to insure against these kinds of personal fines?

Mr Navarro: I do not think it is possible to insure against criminal conduct.

Q38 Mr Challen: You say you are keen to use the lifestyle provisions of the Proceeds of Crime Act 2003 and hope to do so in the near future. Why can you not use it now?

Mr Navarro: Yes.

Mr Stott: Well it is new; it came in in October of last year. The way the Act is written it is really aimed at individuals, but we are keen to extend that to companies and we are working very closely with the Assets Recovery Agency. We would in fact be the first organisation which has used it against companies. We have three cases on the stocks that we are developing and we will be applying in due course for confiscation orders against companies. In a sense, they will be test cases. We think the legislation enables us to do that; no other organisation has actually achieved that yet.

Q39 Mr Challen: How is it going to work in practice?

Mr Stott: In practice, if we can establish that a company, for instance, or a director—if we prosecute a director as well, it would apply against him certainly—have benefited from three or more offences to the value of over £5,000, there is a presumption that the other assets of the company have been acquired by unlawful means. The burden then is put onto the company to establish that they have not been acquired by unlawful means. If they cannot do that, the confiscation order can be made for the totality of those assets. It is a very powerful piece of legislation.

Q40 Mr Challen: We have already touched briefly on the issue of a company’s reputation and I think in your written evidence you refer to advice you have given to the government in response to the consultation on the company law review. You appear to put a lot of faith on the power of shareholders to affect change in the behaviour of companies. Is it not true, when it comes down to it, that it is always the bottom line that comes first? Whilst some shareholders may want to think that they have a stake in a company which is green and environmentally sound, the bottom line is that they all want good returns first, do they not?

Mr Gray: Yes, I guess that is true. I think what probably would help is, if you think of companies which have a very well-known brand name, where they want to protect the name, they do not want a bad image. So I guess it would work with household names, or for companies where environment was quite a serious concern for business because of the liabilities or the regulations. There probably are some situations where the shareholders would have quite a big interest. I guess at the end of the day that the bottom line is going to be fairly important as well.

Mr Navarro: That is part of our engagement with the city and analysts as well: to educate them in the sense that a well-managed company is not one which is going to be committing environmental offences and that is an indicator that the company is not well-managed and there may be difficulties in other areas. That sort of attitude is not going to be successful for the company in establishing a sustainable business. It is through a range of pressures on companies, through the performance of their reputation financially as well as the other sanctions, that we can encourage good behaviour and discourage poor behaviour.

Mr Gray: I think another point might be, if you think of waste and resource use for a company, from a bottom line perspective, and a shareholder perspective, if a company can reduce, minimise waste, eliminate waste, there must be better resource
efficiency. There are obviously shareholder interests in that which could drive environmental improvement.

Q41 Mr Challen: You will have to forgive my ignorance, I am sure the Agency has a well-known position on this, and that is whether or not we should have compulsory Corporate Social Reporting, CSR.

Mr Gray: Yes, we certainly feel that the top, I do not know how many, but we certainly feel that the main companies should be doing that.

Q42 Mr Challen: By law, or just voluntarily? Many do so already. It is widely known—environmental groups describe it as “greenwash”—when they are not regulated they can report anything they like and they tend to make up a lot of it.

Mr Navarro: We include in our submission, our position on this.

Q43 Mr Challen: I shall have to refresh my memory. You have drawn our attention to various civil penalty regimes in Germany, Australia and the USA. Do you have any data to show how successful or otherwise these have been?

Mr Stott: Not data as such, but there have been close contacts between us and the Department of Justice, the American side of things, and the EPA. I do not think we have close connections yet with Germany and the European side. Certainly from the American experience, although obviously they are far further down the line than we are, it can be spectacularly successful. They have a culture, they have grown up using civil penalties which we do not have, but from what they tell us, and obviously they put a gloss on it, they want to put the best possible spin on their side of things, it would be extremely useful for us to have that capability. They regard it as extremely successful; they do not understand why we do not have it.

Mr Navarro: We have provided to the Committee the report from Professor Macrory and Michael Woods of University College London which contains a comparative study of the success of civil penalties in Europe and the United States. It is quite useful, quite interesting reading.

Q44 Mr Challen: Colleagues can relax and not feel guilty about not having read it yet because it only arrived this morning.

Mr Navarro: We only provided it recently.

Mr Gray: I was in America seeing the EPA at the beginning of August and I am going back again in November to try to find out more about this: but they point to some real big successes with what they call supplemental environmental projects. It is not about criminal intent. It is where companies, and they point to companies like Toyota who were not fitting catalytic converters correctly. When it was found out, the company was then willing to enter into an agreement with the EPA which was then embodied in a civil order whereby Toyota then retrofitted catalytic converters and better engine performance to school buses and had their logo on the side of school buses. That ran to quite large amounts of money for Toyota, but they got a lot of good publicity out of it and it was good for the environment. We can point to one or two examples like that. They have a philosophy about the benefits: if companies save money through non-compliance, then they have computer codes to calculate the benefits from the non-compliance and then they would seek to try and get a lot of that saving channelled into some sort of environmental project. Some of it goes to the government; I think the government gets 10%, but they have been quite successful. They give a number of examples, if you speak to them. They have the methodology worked out.

Q45 Mr Challen: Could we assume from that, that there are indeed aspects of these other regimes that we should, in the UK, emulate and are you actually doing anything to try and get the government to do that?

Mr Navarro: We have been in discussion, certainly, with various parts of government and Defra are going to have a conference on this at the end of November. To be fair to them, they commissioned several research papers, of which the Macrory study is one and that conference is designed to bring together the results of that research and to see what the way forward would be.

Q46 Chairman: May I just take you back to the three test cases that you referred to under the Proceeds of Crime Act? What is the timeframe on those? When do you expect those to be completed?

Mr Stott: I would say early next year, bearing in mind it is October now. We know who we want.

Q47 Chairman: Are you willing to say more about those cases?

Mr Stott: No, I would prefer not to.

Mr Navarro: These are ongoing investigations.

Q48 Chairman: When you say, early next year, is that to get it into court?

Mr Stott: To get to court.

Q49 Chairman: That legislation has been around for a little over year now.

Mr Stott: Yes. It has been aimed mainly at the proceeds of drugs trafficking, but it is very wide and the Assets Recovery Agency is very keen, as is the government, to make sure that any illegal activity can be brought within the net. We think the scale of some this waste dumping, on a massive scale, fits.

Q50 Paul Flynn: Do you think there is some truth in the claims made in lots of the submissions we have had by companies who say that the regulations are so complex and unworkable that they have little choice but to break the law?

Mr Gray: I do not think there are many examples: I think there are some examples. Again, it is something that you hear said. We need to distinguish between situations where the law has not caught up; there are some situations in my mind that I am
thinking of at the moment, bio-diesel and things like this, where the law has not caught up or where there are step changes in the law, such as the co-disposal ban in July. There are situations like that where what we do is spell out our enforcement position and our priorities, like we did with hazardous waste, and our priorities are usually around protecting the environment and environmental outcomes. There are situations like that, but I would distinguish those from deliberate non-compliance or flouting.

Q51 Paul Flynn: Are you happy that if there is a situation where the law is clear, but in fact the situation to which it applies means that no reasonable environmental gain would be made, that enormous cost might be suffered by the company itself? Is there sufficient flexibility there?

Mr Stott: Yes, the discretion we have is fine.

Q52 Paul Flynn: You would claim that the law is fine on that at the moment. You do have that discretion.

Mr Gray: There are things that we are trying to get changed. We are trying to get a better way of bringing in waste exemptions, for instance, and we would like the powers to do exemptions rather than having them done in Defra, but that means a change of primary legislation. There are several specific examples where we think the law could be improved. We have been working with Defra on the waste permitting review and that has identified a number of areas we are hoping we can now take forward with Defra. I am just trying to draw a distinction between situations where there are unintended consequences, or there is a new regime and perhaps people are not quite as prepared as we would all have liked them to have been. We will then try to explain what our regulatory priorities are. Another example has been the end-of-life-vehicle industry and shredder waste where again we have had discussions with the industry about our regulatory priorities and agreed what the key things are that we want the industry to comply with. There will be some time available for them then to come into the absolute letter of compliance by 30 November; that is the time we have quoted. We can do that by explaining what our priorities are, our compliance priorities are, but I am just trying to draw the distinction between those sorts of situations and the ones where business may just not comply because they do not think they should. Coming back to the bio-diesel example, there are parts of that where we would like changes because we do not think they are good. However, there are bits we do think are good and we do think companies should comply, but they do not think they should. We have had discussions, and you come to a point where you have to say “Well these are the bits that we say you have to comply with; here are the bits where we will explain our enforcement priorities to you, because the law has not caught up yet”.

Q53 Paul Flynn: If we take the end-of-life-vehicle regulations, I understand one of the concerns is that the market for the substances that are recovered, the glass, the metals and so on, varies entirely, depending on market forces and demand which varies. Is there reasonable flexibility there? Do you see difficulties ahead if those who are recovering end-of-life vehicles and breaking them up find themselves with huge stockpiles?

Mr Gray: We have been concerned to see that there are not huge stockpiles and that there are no vehicles on the street. In terms of the operations, we have been very keen to ensure that the materials which could mean the disposed bits, the shredded bits, hazardous waste are actually removed from the vehicles: things like batteries and mercury switches. Where an operator does not have the full de-pollution equipment and is doing manual de-pollution, they are actually de-polluting the things which are important to us: things like the mercury switches have been removed, batteries have been removed, engine oil, but they may not have the full kit and it may take them some time to install that. A lot of them have not solved that now and we have given a deadline of 30 November. I was trying to draw a distinction between that situation and a situation where somebody is unlicensed, they are conducting an activity, we say “You need a licence for this” and they say “We don’t” and we have a long debate which goes on and on. It just comes to a point where we need to enforce that.

Mr Navarro: Our whole approach though, across all our regimes, is to concentrate on the environment and what the outcome is and have a practical approach where we can mitigate to an extent the applications of the law in practical terms on the ground. We do make use of our enforcement and prosecution policy and target our efforts so that we are directing ourselves at the activities which can have an effect on the environment and not dealing with the much smaller-scale activities which perhaps are not strictly in conformity with the law, but, in common-sense terms, do not need any attention from us.

Q54 Paul Flynn: Thank you very much, that is very helpful. You refer to the outcome of the Defra review of legislation enforced by the Agency, which concluded that it was not practical to harmonise the various regimes, but rather that the Agency and Defra should develop a risk-based approach to environmental legislation which could be applied to new legislation or legislation which had been amended. However, you also say that the progress on this has been very slow. Why is there a delay, where is the delay and what are you doing to progress this?

Mr Navarro: Generally, we face a challenge to influence Europe, and I think they are getting better, and government and legislators to pass laws which are fit for purpose. There is that general effort. In terms of the inheritance of legislation which we have, we know that it has developed rather in a piecemeal fashion and to some degree represents generations of European and national thinking. Quite a complex picture has developed. In relation to the new legislation, we work well with Defra to try to get better new legislation. In terms of coming and looking at the existing legislation, bringing that into...
Mr Gray: That is quite an interesting question; quite a good question. I think the position we find ourselves in at the headline level is that we are committed to efficiency savings. We are making efficiency savings but the bottom line is that the GIA for regulation which we get from Defra is not increasing. It is not increasing with inflation and there are still discussions going on at the moment, so that is still an ongoing subject. The charges we receive from industry are going up much less than our costs because we want to reflect the efficiencies.

Q56 Paul Flynn: What they say in their evidence is that funding for the regulation of responsible industries which is raised through charges on the industry has risen by at least the level of inflation since 1995. In contrast, the grant-in-aid budget from Defra to the Environment Agency, used to fund policing and enforcement of illegal waste activities, has been cut by £4 million in 2004–05.

Mr Gray: I do not know the figures. I do not know whether it was cut or not.

Q57 Paul Flynn: You seem to suggest that it was the same.

Mr Gray: It is certainly a pressure. Mr Navarro: What we need to do is increase our efficiency in terms of issuing permits and the more mechanical aspects of our operations. We are very keen, and Defra has given us a commitment, to continue with this and actually get to a position where we get better regulation. I think it would be a big win on “better regulation” for Defra, if it can be done. The reason we were in the position we were in was because originally we thought we were going to have to do a huge number of permits for WEEE. As it transpired, it was not going to be like that as there became more definition on the regime and we realised that we would not have to do huge numbers of permits. So the whole reason for kicking it off, the goalposts changed and we spotted opportunities then for better permitting, better licensing regulation, better harmonisation between PPC and waste. However, the problem was Defra and WEEE: Defra ran out of road, if you like, and then they had to get on and take a simpler approach to WEEE. Speaking for the Agency, we really want to get this back up and running and get the benefits out of that. One of the things is the point I made before about exemptions; that was one of the things that was identified as being a real benefit.

Mr Gray: The charge payers pay for the permits and we are making quite big efficiencies in PPC permitting, but that then is reflected in the charges not the GIA. It is a very complex question you are asking me and I think it would take a finance director to answer.

Q58 Paul Flynn: Perhaps you could send us a note.

Mr Navarro: I was just trying to make the general point that there is pressure on our income, there is pressure on the GIA and whilst compliance work, inspections, is funded quite a lot out of charges, but also some GIA as well, when you get to the end of the chain the actual enforcement, prosecution, particularly from licences then—

Mr Stott: That is changing as well. In terms of the agreement with local authorities, in terms of waste disposal in particular, fly tipping, the understanding with them, that they, the local authorities, will pick up the smaller type of incidents and we will then be left to concentrate on the heavier end, that agreement has just been signed, if not signed, it is to be signed imminently. They will then pick up the small bagged deposits and anything hazardous or anything of any scale will then be left to us.

Mr Navarro: Basically we are directing our scarce resources where the greatest priorities are; prioritising essentially.

Q59 Chairman: And directing the cost to local government which will not necessarily welcome a new responsibility.

line, that is more difficult; it does require opportunities to be able to do that. In terms of the review that you were talking about, we felt that overall we were not going to achieve the result which we wanted, which we have agreed with Defra, which is the alignment of the waste and PPC regime. It is going to take some time to be able to do that, because the PPC regime is subject to a review in Europe itself, but there will be an opportunity which we need to work towards. It is a slow process, just simply in terms of priorities. Of course the priorities for the government and, to a degree, for ourselves are to concentrate on the new legislation which is coming in and that means that there is not necessarily much time left to deal with the existing. In terms of priorities, they have to worry about infraction proceedings and those are the drivers which reflect priorities. It has taken longer than we hoped, but we are still very keen that we carry on shoulder to shoulder with government, to produce the result we want.

Mr Gray: This is perhaps a personal opinion, but I think that the waste permitting review where we have been working with Defra has been an example of very good practice in terms of how we can work together. What we need is almost a top-to-bottom look at how we do regulation, because what we do on the ground has to marry up with the legislation. I felt that the permitting review was a good exercise. We are very keen, and Defra has given us a commitment, to continue with this and actually get to a position where we get better regulation. I think it would be a big win on “better regulation” for Defra, if it can be done. The reason we were in the position we were in was because originally we thought we were going to have to do a huge number of permits for WEEE. As it transpired, it was not going to be like that as there became more definition on the regime and we realised that we would not have to do huge numbers of permits. So the whole reason for kicking it off, the goalposts changed and we spotted opportunities then for better permitting, better licensing regulation, better harmonisation between PPC and waste. However, the problem was Defra and WEEE: Defra ran out of road, if you like, and they then had to get on and take a simpler approach to WEEE. Speaking for the Agency, we really want to get this back up and running and get the benefits out of that. One of the things is the point I made before about exemptions; that was one of the things that was identified as being a real benefit.

Q55 Paul Flynn: You will be touched to hear that the Environmental Services Association are very concerned about your future finances and point out that the grant-in-aid budget had been cut by £4 million and they are also very concerned about the comprehensive spending settlement, what effect that will have. They say that in this case the settlement commits you to finding efficiency savings of £75 million. We all appreciate the need for efficiency savings. Given the nature of the work of the association, the need to expand it and to improve the result of it, is it practical to find these savings without some deterioration in your work enforcement?
Mr Gray: There is an issue here about resources and funding and we have been saying we need more resources, firstly for our own capacity on things like fly tipping, illegal disposal, illegal dumping. So we do need more resources and we are making a case for them. ESA are supportive and we are grateful for that support. We do not just want more resource for our own activities, we want to try to work with local authorities where it is needed, because it does vary; we do want to try to work with local authorities and help them build their capacity as well. There is an issue and we are trying to get more resources. I do not know where it comes from. We are trying to get it through the landfill tax to some extent and we have support around the place for that, but nobody is bringing the money forward.

Q60 Sue Doughty: First of all, may I quickly refer back the point you were making at the beginning about enforcement? You referred to existing environment officers and to new special enforcement teams. How many enforcement officers have you and what is their remit?

Mr Stott: Overall, we have approximately 3,000, but we have started to group them into small specific dedicated units, special enforcement teams and we have 12 of those across eight regions. We have just completed a review of their performance and an average size of them would be around 8 or 10 or so, approximately 700 per annum about 38 to 40% are completed a review of their performance and an

Mr Stott: Eight to ten within the special teams. Then there will be other officers also doing enforcement in general terms, but non specialist, with other duties as well.

Q62 Sue Doughty: You have explained about more convictions, higher level of fines with the specialist team, but what is the actual impact on the occurrence of crime, particularly corporate and business environmental crime? Have you got any information about that?

Mr Stott: Whether they are related I cannot say, but the total number of incidents in categories one and two, which are the major, most significant incidents which we measure—categories one and two—have fallen over the past three years from a total of around 2,000 or so down to about 1,200. Whether or not it is the effect of them—it is probably an influence of other factors as well—inevitably they are going to have an effect.

Mr Gray: Is your question: to what extent is it the corporations, is it corporations that are causing incidents and committing crimes, as distinct from . . . ?

Q63 Sue Doughty: Yes.

Mr Gray: I just wonder whether we should give you some figures; perhaps we could try.

Mr Stott: About 38 to 40% of the totality of our case work is registered companies, the rest is individuals.

Q64 Sue Doughty: Prosecutions?

Mr Stott: Yes; prosecutions. Out of a total of approximately 700 per annum about 38 to 40% are against registered companies, the remainder against individuals.

Q65 Sue Doughty: You also said, and you said this also in the evidence, that you do not have sufficient resources for tackling those environmental criminals who pose the greatest risk to the environment. You have told us that the resources are finite; you have looked at the reinforcement strategy in order to focus activity where risk is identified as being greatest and you use the OPRA (Operator Performance Risk Appraisal) tool to facilitate risk analysis. Could you tell us briefly how that works and whether you feel it is working?

Mr Gray: I think a good illustration of how we use OPRA is in Spotlight where you can see we have used the OPRA data in two ways. I do not know whether you have the report but you can see the diagrams.

We can use OPRA scores; we band them A to E, where A is a well-managed company or site—it is done at site level rather than company level—E is poorly managed. Over time we can track what the sector is doing, whether things are improving and we can track individual sites. A well-managed site would need less regulatory effort, less enforcement, less compliance effort than a poorly-managed site. If a site was coming out as a D or an E then they would be seeing a lot more of us, than, say, a site that was an A or a B.

Mr Navarro: We are seeing success in that direction, because we are seeing the bands gradually going up and we do not have any category Es this year.

Mr Gray: There are very few. For a category E we would be there right now trying to do something about it. We are trying to extend OPRA. The one we described there was the OPRA scheme for PPC.
There is a different OPRA scheme for waste that we want to merge with the PPC OPRA and we want to have discussions with the industry fairly soon about how we do that. We have the longer-term objectives of trying to bring water companies etc. into OPRA but that is a number of years down the road. Certainly OPRA is a very good tool. You know if you are an A or if you are an E where you stand; you can track performance. We have internal targets regarding targeting effort on Ds and Es. The other thing we use OPRA for, certainly in PPC and also in waste, is to link the OPRA to the charging: the operator performance correlates to the charging. So for PPC OPRA, there are financial factors that we then apply to the scores to get the charging; there is a risk-based charging which reflects regulatory efforts as well. When you bring in new things like this, it sometimes takes a bit to settle down, but these are ground-breaking approaches. When we talk with regulators across Europe and in the USA, they really are very taken by this and a number of regulators around Europe are in discussion with us about whether they can use these approaches as well. It is something which we are developing, we want more types of regulations to come in and we want a consistent approach across the different regimes under which we regulate the industry, so we can get a common OPRA system.

Chairman: Thank you very much, that concludes our session. I am very grateful to you.

Memorandum from Environmental Services Association

1. ESA is the sectoral trade association for the United Kingdom’s waste and secondary resource management industry, a sector annually contributing more than £5 billion to UK GDP and working to align the UK’s economic and environmental sustainability.

2. ESA’s Members want to be enabled to deliver the United Kingdom’s compliance with the European Union Landfill Directive and other relevant EU law, by pre-treating hazardous wastes and by returning to the productive economy more of the energy and materials contained in waste.

3. ESA’s experience is that:
   — The reputation of environmental regulation is compromised by poor design and chaotic implementation;
   — Regulatory enforcement appears to focus on responsible operators rather than criminals who flout environmental laws; and
   — A much more modern system of environmental regulation making greater use of a responsible operator’s own management systems could enable more resources to be allocated to detecting and prosecuting environmental criminals.

Do the bodies responsible for investigating and prosecuting corporate environmental crime have sufficient powers and resources to do so?

4. The Environment Agency does not appear to have sufficient resources focused on tackling those environmental criminals who pose the greatest risk to the environment.

5. For example, funding for the regulation of the responsible industry—which is raised through charges on the industry—has risen by at least the level of inflation since 1995. In contrast, the Grant in Aid budget from DEFRA to the Environment Agency, used to fund policing and enforcement of illegal waste activity, has been cut by £4 million for 2004–05 even though the implementation of more prescriptive EU environmental standards is bound, if inadequately prosecuted, to increase criminal activity. In addition, the Comprehensive Spending Settlement commits the Agency to deliver further efficiency savings of over £75 million, again at a time when illegal waste management activity is increasing.

6. Detection and prosecution of illegal waste management activity is carried out for the public good and more public funding is needed to meet these imperatives of public policy.

7. An obvious source of funding would be the increase in landfill tax receipts resulting from the Government’s announcement to raise landfill tax to a medium-term target of £35 per tonne. Total landfill tax receipts for 2002–03 were £541 million and revenue from landfill tax is likely to increase significantly as the escalator increases to at least £3 per tonne per annum.

8. A further solution, which ESA has consistently advocated, would be for the Agency to target its resources more effectively by making better use of responsible operators’ own management systems. This is in line with the thinking of the immediate past EU Enterprise Commissioner, and the National Audit Office (2002) recommended that the Agency should pursue this further. ESA has also amended its own constitution to enable us to continue to develop an enforceable code of conduct.
Are the bodies responsible for investigating and prosecuting corporate environmental crime able to conduct robust and effective investigations into the source of the crime and mount effective prosecutions that target those who are responsible for the crime, as well as the person actually committing it?

9. The Environment Agency is already able to prosecute individual directors for a corporate failure to put in place procedures and systems to manage waste according to environmental law.

10. To be truly effective, the Environment Agency must take a risk-based approach and distinguish between responsible regulated companies and those who operate at the margins of, and often beyond, environmental regulation. It needs to target known individuals with a reputation for endangering the environment by operating businesses with a wanton disregard of environmental standards, providing no transparency in operating performance and disguising assets within complex company structures.

11. ESA’s written evidence to the Environmental Audit Committee’s Inquiry into Environmental Crime suggested how the investigation and prosecution of environmental crimes could be improved. We noted, for example, paragraph 4 of the Sentencing Advisory Panel’s advice to the Court of Appeal which states “It has been put to us by some of those involved in the daily work of the courts that standards of presentation in environmental cases need to improve”. We would welcome—and fully co-operate with—a review by the Environment Agency of how it prosecutes environmental offences.

Are the penalties for corporate environmental offences adequate? If not, how can penalties and punishments be better targeted to ensure that the criminal justice system is effective in acting as a deterrent?

12. As noted above, resources and activity must be focused on those who pose the greatest threat to the environment rather than on those who are the easiest to regulate.

13. There is a great difference between someone who, with reckless disregard for the environment and human health, deliberately chooses to evade legal requirements, and responsible regulated companies providing a public service who occasionally and often without fault err (sometimes as a result of criminal damage inflicted on their facilities by third parties) from total compliance with the strict regime to which they are subject.

14. ESA’s Members aim to exceed the minimum requirements of the law. For example, ESA’s Code of Conduct requires that Members report in line with a series of environmental indicators developed by the Green Alliance. Our Members have also invested in externally verified environmental management systems and, through published annual environmental reports and otherwise, are achieving greater transparency in their environmental performance.

15. For a reputable trading company, which in the case of ESA’s larger Members will typically run a range of utilities in various countries and whose securities will typically be listed, adverse publicity can itself be a harsh punishment.

16. We are aware of no instance where the availability of an unlimited fine and/or imprisonment for a term not exceeding five years in the Crown Court, as provided in a number of statutes concerned with environmental protection, including the Environmental Protection Act 1990, would have been inadequate to reflect the seriousness of the crime.

17. However, we are not satisfied that criminals perceive that if they commit an environmental crime they are sufficiently likely to be detected and then prosecuted to be deterred. We are particularly concerned about criminals who unlawfully handle hazardous waste.

18. ESA believes that the best deterrent to environmental criminals is significantly to improve detection and prosecution. In a context where detection of environmental crime is low, increasing the tariff in itself may not act as a sufficient deterrent.

19. We have reservations about proposals expecting larger companies to pay larger fines as this could produce environmentally perverse outcomes. It is inequitable to impose high damages on a large and essentially well-run company but smaller damages, for a similar or worse offence, for a less well run smaller company. The British authorities have already made running waste management facilities quite a risky proposition for responsible companies and it could not serve the public interest for this risk to be of a level to deter better quality investors.

20. In a context where strict liability often applies and where it is not necessary to prove fault on the part of a regulated operator, it is easier to prosecute reputable regulated companies for technical breaches of licence conditions (which could arise from the damage to our Members’ regulated facilities inflicted by criminals with no connection with our Members) than to pursue “professional” criminals who may be causing much more serious environmental damage.
What alternatives, outside the criminal justice system, should be considered for dealing with corporate environmental offences in order to reduce environmental harm by businesses? For example, should there be greater use of alternative means of punishment, such as the use of prohibition notices, civil penalties and the confiscation of company assets?

21. A “zero-tolerance” approach should be adopted towards businesses which deliberately flout environmental laws. In principle, ESA supports the Environment Agency being granted more resources to investigate criminals. We see no evidence that the Agency’s current skills would enable it to undertake forensic auditing and developing such skills would have implications for the Agency’s resources.

Are there too many environmental duties and responsibilities on corporate bodies which serve only to stifle their ability to compete in the market place? Are the laws and regulations applied uniformly across the business sector?

22. The Chemical Industries Association recognises that waste producers in the UK have enjoyed some of the lowest management costs in the European Union. For example, landfill costs are typically three times greater in Germany than in the United Kingdom.

23. The Government recently reported that in 2002, total spending by UK industry on environmental protection amounted to an estimated £2.6 billion. This represents 0.4% of the total turnover for these industries. This is much less than the annual £11.5 billion cost to industry resulting from absence from work and far less that the cost of legislation relating to employment.

24. ESA has consistently stated that such regulation is only sustainable if it aligns economic and environmental outcomes, works with the grain of the market and is based on sound science. Moreover, regulation must be implemented and enforced effectively and consistently across the UK and the EU to provide certainty for business and a level playing field.

25. The result of badly designed and poorly implemented regulation is to give environmental legislation a bad name as a whole. For example, delivering compliance with the Landfill Directive will transform recycling and recovery rates in the United Kingdom. However, its implementation by the Government is a text-book example of what should not happen. The failure of the Government to provide regulatory certainty has caused widespread confusion for managers and producers of waste and delayed investment in the next generation of waste management technologies.

Is the Government doing enough to educate the business sector in terms of their legal obligations with regard to environmental issues which impact on their business? Is there sufficient dialogue and co-operation across Government and the business community to ensure that best practice, for example, can be shared?

26. Our experience is that waste-producing business as a whole is unaware of its legal obligations. For example, a survey by the Environment Agency published in 2003 revealed that 76% of businesses were unaware of their legal “duty of care” to ensure that waste is managed lawfully. Again, ESA has expressed particular concern about levels of ignorance in the specific context of hazardous waste.

A Case Study: The Landfill Directive

27. Symptomatic of the chaotic implementation of the EU Landfill Directive has been the lack of a coherent and systematic strategy to raise awareness amongst waste producers.

28. For example, a Parliamentary written answer to a question tabled by Ms Sue Doughty MP reveals that five years after the Directive was agreed, and only three months before one of its major provisions came into effect (the end of co-disposal of hazardous and non-hazardous waste) a dedicated communications strategy was still not in place:

Mr. Timms: “Defra lead on hazardous waste and the Landfill Directive, but the DTI is assisting in the development of a communications strategy which will raise awareness of these issues among businesses through a variety of mechanisms and media. I understand that my colleague the Minister of State at Defra will be providing the hon. Member with further details of the activities being planned over the coming months”. (April 2004)

29. At this stage of implementing the Landfill Directive, a communications strategy should have been developed and in force rather than being developed.

30. ESA recognises the contribution that all sectors can play in raising awareness of the implications of new legislation. For instance, in partnership with EEF, ESA held roadshows across the country to outline to manufacturing companies the implications of environmental legislation for their business.

31. However, EU Directives and Regulations are signed by the Government which itself should provide leadership necessary to ensure compliance. There is little evidence of the Government providing leadership either in implementation of the Landfill Directive or communication of its impact.
32. The Government’s dedicated website on hazardous waste was only available in the immediate run up to the end of co-disposal. We have not yet seen any evidence from the Government to demonstrate that this website has significantly raised awareness of hazardous waste, particularly among SMEs.

33. We believe that as a matter of routine the Government should develop a communications strategy as soon as Directives appear in the Official Journal rather than—as currently happens—a few months before key deadlines. The strategy would, for example, outline the key issues and identify key partners with whom the Government would work in partnership.

34. Moreover, we believe that the Environment Agency needs to direct more of its enforcement activity towards waste producers. By directing its regulatory approach towards waste producers the Environment Agency can create an environment where the waste producer perceives there to be a real threat of detection and prosecution if it fails to comply with its legal obligations.

Witneses: Mr Mike Walker, Director of Policy and Public Affairs, Environmental Services Association (ESA) and Mr Per-Anders Hjort, Managing Director, SITA UK, examined.

Q66 Chairman: Welcome; I am sorry we are running late. It would be helpful if we could keep our questions short and you could keep your answers crisp as well. You heard us talking there with the Environment Agency about the difficulty they have in dealing with the multitude of small businesses, as opposed to the larger, usually regulated, businesses which is much easier to do. In the ESA memorandum you accuse the Agency of going for quick wins and not really getting to grips with the problem, so they ought to adopt a risk-based approach to their work. Implicit in what we have just been hearing is that they believe they are working on a risk-based approach. Do you still disagree, having heard what you heard earlier today?

Mr Walker: We would agree that the ultimate aim of Agency policy appears to be moving towards a risk-based approach, but we think that there is still some way to go. What we want to do is to work with the Agency to make sure that their efforts are targeted at real environmental criminals and give greatest benefit to the environment. We do believe that greater effort should be targeted at illegal operators; we do not believe enough effort is targeted at that end of the spectrum at the moment. There are a number of reasons for that. It is partly due to the chaotic implementation of EU legislation, which means that there are opportunities for criminals to get involved in waste management activity because waste producers are often confused about what new regulations require. Secondly, it is a matter of resources being made available to the Agency and then directed in the right way so that they can tackle illegal operators.

Q67 Chairman: You introduce an interesting concept which is no-fault pollution. You stress the differences between those you describe as “... responsible regulated companies providing a public service who occasionally and often without fault err...” and those who “... with reckless disregard for the environment and human health, deliberately choose to evade legal requirements”. We know that both camps exist, but to set up the two in opposition is rather to miss the point, is it not? There is no such thing as no-fault pollution in law anyway. Are you not just creating a saints and sinners environment which is not actually very helpful to the Agency or anybody else who is trying to tackle the problem?

Mr Walker: I would draw a major distinction between responsible operators such as ESA’s members, who often have verified environmental management systems such as ISO14000 in place and which produce transparent annual environmental reports. They are often inheriting sites, through mergers and acquisitions, which may not have been operated to such high standards. Obviously after such an acquisition it takes a while for standards to improve, to get the work of the company up to speed. Mr Hjort may be able to expand on his experience of that.

Mr Hjort: I have limited experience from the UK. I have worked for SITA as managing director since April 2003. If I look at my company as a whole, we employ 5,000 people with approximately 40 to 50 landfill sites. We spend around £2 to £2.5 million a year on environmental compliance: £2 million on the internal costs, on our internal control organisation and about £0.5 million to the Environment Agency. It is important for companies like ours to have very high environmental standards because that is the basis of our business. If we look at the internal procedures which we have for our personnel, the environmental compliance is a key bonus targets for people. Of course we have issues. Our company has been prosecuted. We have had problems with odour from landfill sites, problems with leachate from old landfill sites mainly from sites acquired from local and regional councils, which is something which we need to deal with. It is probably the same if you look at all the different landfill sites throughout the country as a whole: there are many old former public landfill sites which could have looked better than they currently do and we have to deal with them.

Chairman: That illustrates the point I was trying to get at really. If it were really the case that members of ESA were as good as gold and never got prosecuted for anything and only people who are not members of the ESA are out there deliberately polluting the countryside, then we would be talking about a very different overall picture. I just suggest to you that trying to create the contrast that you have done is not helpful.

Q68 Mr Thomas: We had a discussion a little earlier about resources for the Environment Agency and your evidence pointed out some of your concerns about the squeeze from both efficiency savings and from the grant-in-aid. You suggested in your
memorandum to us that you could overcome this in two ways: one was the landfill tax approach, which is clear to us and we can see how that may work. The other one was something which you called responsible operators’ own management systems. Could you say a little more on that? It seems to me that in that context you would be expecting the company to do the inspection work on behalf of the Environment Agency.

Mr Walker: What we are highlighting is the fact that responsible companies generally are moving towards implementing recognised, externally verified, operating systems such as ISO14000 and other environmental audit systems. It costs the industry to implement these systems, there are significant internal costs in putting those in place. As they are externally verified, we believe that the Agency should be able to use the information coming from those systems rather than going and doing all the work again.

Q69 Mr Thomas: Does that not happen already? The evidence from the Environment Agency seemed to suggest to me that where you have a company like that, then the approach of the Environment Agency is to visit that company less often, to regulate it more lightly than a company which does not have such systems. Is that your experience?

Mr Hjort: I cannot comment on other companies then us. The number of visits you get varies quite a lot depending where you are in the country. The only way forward for big companies like ours is to build up the internal controls and welcome the EA coming in and looking at them. I think that is also more effective because we need to have these internal procedures in place in order to operate in a proper way. That would also make the EA’s life more efficient and make it easier to deal with all the other problems which are out there.

Q70 Mr Thomas: In your experience at the moment does the Environment Agency make a material differentiation between companies which have those external ISOs and those which do not?

Mr Walker: There is a differentiation, but not as much as we would like. The overwhelming experience of ESA’s members is that the Agency still regulates using a prescriptive approach, looking at the detail of processes. Everybody recognises a need to move towards an output based system of regulation which will use management systems more. We need to move towards that approach more rapidly. The Agency has talked about setting a sector plan, where we would work together to try to improve regulation across the whole of the sector. That is something we really want to work with the Agency on. We believe that with European legislation coming through at an increasing rate, we need to be able to plan exactly how we are going to be regulated, not next year but for the next five and ten years.

Q71 Mr Thomas: You also mentioned in your evidence some concerns you had about European legislation and you even suggested that if we were not careful it could increase criminal activity.

Mr Walker: Yes.

Q72 Mr Thomas: You specifically said inadequately prosecuted European legislation. Can it ever be justified that any company should not follow a European directive? In what way do you think European legislation can increase criminal activity?

Mr Walker: ESA supports EU legislation on waste. Waste regulation drives the market in waste management activity.

Q73 Mr Thomas: So it is waste in particular that concerns you here.

Mr Walker: We support the principle of EU legislation on waste being well implemented across the UK. Our concern is with the way that it has been implemented. It often takes a long time to put it into UK law and, when it is in UK law, inconsistencies and uncertainties often still exist. That climate of uncertainty actually allows illegal operators to flourish. As the Agency said in their evidence, the vast proportion of small businesses do not recognise their duty of care to have their waste managed responsibly. That is a legal duty of care which already exists. It is then not surprising that they do not know about the new legislation which is coming in, which is more onerous. We support the legislation, but it is quite often going to be more onerous for waste producers. It does allow the opportunity for illegal operators to come in and offer cut-price services to waste producers.

Mr Hjort: When prices, which will, go up when there are higher environmental standards, we create a possibility for people who do not take this seriously to earn more money by not doing business correctly, and according to the law.

Q74 Mr Thomas: Presumably eventually the regulating system catches up with those fly-by-night operators.

Mr Walker: Eventually the regulatory system should catch up with those fly-by-night operators. Our concern is what happens in the interim because responsible operators are making investment in order to meet new standards. Once the treatment plant is put in place, if no waste flows to those plants because of inadequate enforcement, then you have a stranded asset and it is a waste of money for the industry.

Q75 Mr Thomas: It is certainly a concern which end-of-life operators in my constituency have raised with me. They are preparing for the directive and others do not seem to be and yet are still in that line of work. Could we turn to your own organisation? Could you tell us how many members you have?

Mr Walker: ESA has almost 150 members. We represent the UK waste management industry. The vast majority of our members operate waste management infrastructure; we have a smaller number of associate members who are legal
companies, equipment manufacturers, consultants, et cetera. The vast majority of our members are SMEs. In terms of turnover and waste handled that is concentrated in a relatively few members.

Q76 Mr Thomas: You mentioned in your memorandum that you have a code of conduct. Does everyone subscribe to that?
Mr Walker: That is right. It is part of the articles of association.

Q77 Mr Thomas: So if you join the ESA you have to subscribe to the code of conduct.
Mr Walker: Yes. We have a code of conduct, we have a detailed disciplinary procedure and we have the power to expel or censure members when the code of conduct has been breached. Originally the code of conduct was restricted but in the last year it has been expanded to include health and safety, signing up to health and safety targets which have been agreed with the Health and Safety Executive, and environmental reporting in accordance with Green Alliance indicators.

Q78 Mr Thomas: Can you tell us whether you have ever taken action against a company under your code of conduct?
Mr Walker: Certainly we are prepared to take action. The way we like to do it is to work with the members to improve standards. We do not want to expel members, other than as a last resort. It has been done.

Q79 Mr Thomas: You have expelled members.
Mr Walker: Yes. We prefer to work with members and try to improve standards across the board as the most constructive way.
Mr Hjort: It is also quite important when you apply to be a member that there is control over who can come in.

Q80 Mr Thomas: Are you working with any member or members at the moment in that way? You do not have to name them, but I just wondered whether you were.
Mr Walker: We work with all our members all the time and try to improve standards across the whole of the industry. We are promoting best practice in recycling, and have provided information on that. In terms of the Green Alliance indicators and reporting, we have had a substantial project which has taken place over the last 18 months to help our SMEs in particular to put the systems in place to be able to report against the indicators.

Q81 Mr Thomas: Since we were told earlier by the Environment Agency that SMEs were actually quite responsible for a great number of the pollution incidents and since you have also told us that the majority of your members are SMEs, do you think that there any failures there in terms of education and disseminating best practice?
Mr Walker: I am not sure whether the Agency was suggesting that it was SME waste operators who have caused problems.

Q82 Mr Thomas: No, probably not.
Mr Walker: That is not our experience. There is a challenge in getting information on environmental regulations across to SMEs; it is simply a resourcing issue. We do work very hard. We have an active SME forum which takes presentations from the Agency, from DTI and Defra to try to get messages out to our smaller members.
Mr Hjort: The problem is getting the information out to everybody else, the actual producers of the waste and getting their understanding on how to deal with it and that is something which to my knowledge all the operators do on a regular basis. Whenever new legislation comes in we send out information and there have been many changes in legislation recently and we have to inform the waste producers of that.

Q83 Mr Thomas: You can inform your members, but do you also see yourselves as having a wider role, in informing your members’ customers about how they should also be dealing with this?
Mr Walker: We do that through working with the Federation of Small Businesses and the CBI and we encourage those organisations to get information out to their members that way.
Mr Hjort: It is commercial; take the waste code of conduct?

Q84 Mr Thomas: As a matter of interest, we heard about some 11 directors who had been personally fined. Are you aware whether any of those directors were your members?
Mr Walker: I cannot comment on that one; I do not have the information.

Q85 Chairman: You cannot comment or you do not know?
Mr Walker: I do not know.
Mr Hjort: We do not know.
Mr Walker: I can come back to the Committee on that.

Q86 Mr Thomas: If that were ever to happen, all the cases we have heard involving the Proceeds of Crime Act or whatever, what action do you then take within your code of conduct?
Mr Walker: We have the power to expel or censure members or impose other sanctions.

Q87 Chairman: It just occurs to me that were any of those 11 to have been members of ESA, you ought to know. I am surprised that you have not been able to give us a definitive answer.
Mr Walker: I can check.

Q88 Chairman: Can you tell us what proportion of waste you think is being dumped illegally?
Mr Walker: It is very difficult to say that because we do not have information on waste flows. Waste data is notoriously inaccurate. One of the things which Defra is proposing is a waste data strategy, something which we have supported. We have been working with OECD and the EU to try to develop real-time monitoring of waste flows. At the Hazardous Waste Forum earlier this week, the Agency stated that it was moving away from recording compliance through site inspections to a picture of knowing where 85% of hazardous waste actually originated and where it was going to. The fact that the first target is knowing where 85% of hazardous waste is going shows that there is a problem out there because we really should be aiming for 100%. There are great difficulties. What we do know is that our members would have expected greater amounts of hazardous waste to go through their treatment facilities following the changes both this year and two years ago. Liquid hazardous waste was banned from landfills in July 2002. There has been no increase in liquid hazardous waste going through treatment facilities since the question is: where has that gone? Similarly, following the ban on co-disposal this year, there are reports that hazardous waste is not going to hazardous waste landfills. Where is it going? Whilst nobody can say how much hazardous waste has been illegally dumped, it is certain that some of it is missing, has fallen out of the system, as it were.

Q91 Chairman: In any case the financial impact is often so minimal as to be almost laughable. This is one of the issues which the ESA makes in its evidence to us and it is something we have heard repeatedly over the course of this year. There is no real disincentive for people, other than the shame for a reputable company, to behave badly. What is the answer to that? How do we create disincentives so that we can encourage better behaviour and compliance?

Mr Walker: There is a chain of action: crime first needs to be detected, then prosecuted and then you need penalties in place. Key to all of that is having better levels of detection. There can be very high penalties, but if there is very little chance of being detected, they are not going to act as a deterrent to criminals.

Q92 Chairman: Have high penalties?

Mr Walker: You can have high penalties, but if there is very little chance of detection, they are not going to act as a deterrent. Improved detection is something which ESA has called for over the last couple of years: there should be hit squads of trained Agency officers going out and making sure that detection levels are much higher.

Q93 Chairman: We have a slight advantage over you in that we have seen the government’s response to our report Environmental Crime and the Courts, which we shall be publishing shortly. I can tell you that in that the government say they are looking quite carefully with the Environment Agency at the whole question of civil penalties. Does the ESA have a position on civil penalties as a tool for dealing with this problem?

Mr Walker: It is something which we should be happy to explore. For criminals, the penalties are less of a problem than the detection rate. If civil penalties were introduced for legitimate operators, we would have to see what they would involve. The principle concern at this stage is that the penalties are less important than the detection rate for the illegal operators.

Q94 Sue Doughty: Back to one of our favourite subjects, the EU Landfill Directive. There were many problems with this, as we are all aware, with 75% of businesses being unaware of their duty of care to ensure that waste is managed lawfully. In the preparation you have done, you have highlighted what you saw as the government’s failure to prepare for this and to implement the Landfill Directive as a more general example of how it has failed to educate and inform the business community of its responsibilities. Why are you saying this about the government? What is your opinion about the government’s action in respect of this?

Mr Walker: In terms of the Landfill Directive, we have had five years since it was agreed at the EU level and detailed guidance is still only just coming out from government on what the legal obligations are on responsible businesses. The whole implementation of the directive has been very slow. It had led to much uncertainty within the waste
management industry, but also among waste producers. There are serious implications for waste producers, particularly in terms of separating hazardous waste. The concern is, in a climate of uncertainty, and where information is not coming from the government which allows companies to plan to build new treatment infrastructure, or for waste producers to change the way they actually produce waste, that we end up with a system where illegal operators can go in and offer cut-price waste management services which are themselves illegal.

Mr Hjort: I do not have any specific information, but there are many different businesses and geographical areas where we do not even bother to invest or even to think about it because it is not possible for us to compete on price and at the market level. We may be very costly, so it might be wrong, but our gut feeling is that the price level which is prevailing in some parts of the country is not the right price for treating waste in the correct way.

Q95 Sue Doughty: Do you think government has done anything to learn from this? I do not think this will be the last in a line of problems we have had with the government being proactive as opposed to reactive and very late in its reaction to further waste directives.

Mr Walker: There is increasing recognition that we need a plan for each directive as it comes through, not just implementing it into UK law, but then how it is going to feed down to the people who actually work within that law. It needs to involve industry, the waste producers, waste management industry, the Environment Agency and government at an early stage so we have a plan. The Better Regulation Task Force has suggested a road map for every piece of legislation which comes out of Brussels. We would certainly support that. It is not just talking to industry during the implementation in the UK, but it is also agreeing the directives in the first instance in the negotiations in Brussels to make sure that what is being agreed is actually practicable within the time period which has been set.

Q96 Sue Doughty: How confident are you that the government will actually do this?

Mr Walker: We are getting the right words from government. There is a recognition politically and within Defra, but it remains to be seen how the process will work out. Defra has set up a better regulation unit within the Department itself and we look forward to working with that to make sure that regulations are more practicable in the future.

Q97 Sue Doughty: In terms of what the ESA did to prepare its members, how successful do you think you were as an organisation in preparing your own membership?

Mr Walker: We have been successful in preparing our membership on the basis of the information which was available. One of the problems we have had is that detailed guidance on technical issues was not settled until a very late stage. At the moment we are still waiting for detailed technical guidance on hazardous waste management activity and as soon as we get that guidance, we shall make sure our members know about it. Until that is set, our hands are tied.

Mr Hjort: As a member, I fully agree.

Q98 Mr Thomas: I am interested in Mr Hjort’s comments about areas of the country and types of waste that SITA does not bother with because you just cannot compete on price. Presumably if you, as an ESA member, are not able to compete on price then most other ESA members will not be able to compete on price either.

Mr Hjort: Yes.

Q99 Mr Thomas: Most other members of ESA would not be competing in that market either then. I would assume you see yourself as competitive with other ESA members. So the implication is that there is a whole sector or area of the country which is just open to illegal operators.

Mr Hjort: There are different areas geographically and by type of waste and what I mainly have in mind is construction waste, which is quite hard to deal with because there are many small players on all sides. The prices and the problems with a lot of hazardous waste content are not something we can deal with.

Q100 Mr Thomas: What in your experience is happening to that waste? Is it tipped, dumped, illegally, or is it being taken and put in landfill or disposal sites and are the owners and operators of those sites also being rather loose, shall we say, with the regulations?

Mr Hjort: I do not know, to be honest. A lot of sorting is going on in different places under conditions which a company like ours would not allow people to work. There are probably many operations like that going on. The working conditions in some places are conditions we would not work under. I cannot say where illegal dumping is taking place, because frankly I have not seen any illegal dumping with my own eyes.

Sue Doughty: It has been suggested to me that it is being mixed in with non-hazardous waste and getting into landfill. Do you have any comment to make about that?

Mr Walker: The National Hazardous Waste Forum discussed this earlier in the week and around the table nobody really knew where it was going. The Agency said that it was going to be looking at hazardous waste landfill sites in the next few months to try to get a better handle on what has happened to hazardous waste since July.

Q101 Sue Doughty: In this context, there was a query about whether in fact there had been an increase in disposal of hazardous waste before co-disposal ended which would mean that people had been front-loading their activities. Is that still a possibility or are we still saying that there is a considerable gap in the amount of hazardous waste we would have expected to be disposed of now which cannot be explained away by any other means?
Mr Walker: Before July, there was certainly increased hazardous waste landfilled, contaminated soil particularly, which is the largest component of hazardous waste by weight and volume. It was obvious that construction sites were being cleared in advance of the regulations and the waste was being co-disposed. That will account for some of the drop in hazardous waste produced since then. Nevertheless, there is concern that there is other hazardous waste which is falling out of the regulatory system in one way or another.

Chairman: Thank you very much; that has been extremely interesting. Thank you Mr Walker and thank you Mr Hjort, we appreciate that you are an extremely busy man and we are grateful to you for your time. This is a little underhand, but since the representatives of the Environment Agency are still in the room and as we have another five minutes, it would be extremely helpful if you would not mind coming back and talking about this issue of hazardous waste and the missing waste which has just been raised by ESA.

Supplementary memorandum from the Environmental Services Agency (ESA)

A. A Framework for Law and Order

Implementation of higher environmental standards should not automatically result in an increase in criminal activity. However, chaotic implementation of EU Law—as we are experiencing with the Landfill Directive—is making it easier for criminals to operate whilst creating more difficult trading conditions for regulated companies. Awareness amongst waste producers of changes to the legal framework is low and we do not believe that the law is being applied consistently and proportionately.

B. Priority Action: Fines or Detection?

We believe the scale and nature of sentences provide sufficient scope to the Courts. We are aware of no instance where the availability of an unlimited fine and/or imprisonment for a term not exceeding five years in the Crown Court, as provided in a number of statutes concerned with environmental protection, including the Environmental Protection Act 1990, would have been inadequate to reflect the seriousness of the crime.

However, for there to be a proper deterrent, criminals need to believe that there is a significant risk of detection, prosecution and conviction. Tough penalties are already in place: an infrastructure capable of detecting and successfully prosecuting environmental criminals is not.

ESA believes that the Environment Agency lacks adequate resources in a number of areas.

Technical/Experience

The Environment Agency pays low salaries which makes it difficult to recruit and retain officers possessing the skill and experience successfully to investigate and prosecute environmental offences.

IT

The Environment Agency has no real-time data on waste and resource flows which makes it easier for wastes such as hazardous liquid waste, banned from landfill from 16 July 2002, to “disappear”. ESA understands that £15–20 million would be needed to fund the real-time waste capture system we believe to be a basic regulatory requirement.

Financial

The Environment Agency needs additional resources effectively to detect and prosecute illegal waste management activity. The Jill Dando Institute of Crime Science’s report (A Problem-Oriented Approach to Fly-Tipping, July 2004) noted that the Agency’s detective resources “are limited”. For example, in London in 2002, the Agency had 11 investigators dealing with 442 incidents of fly-tipping amounting to a workload of 40 crimes per investigator. By contrast, the Metropolitan Police has 128,000 officers dealing with 1,080,741 crimes in London in 2002–03 amounting to a workload of eight crimes per officer.

At the same time the Agency has proposed to increase charges to responsible operators by up to 450%. The proposed increases come at a time when our Members have seen little real improvement in regulatory services delivered by the Environment Agency. For example, only 20% of the 250 PPC permit applications that have been submitted have been processed: the Agency’s target was 80%. Our Members are also already investing significant sums in internal management and control systems to improve environmental performance.
The provision of additional resources to the Environment Agency is not the only solution: the Government and the Agency must also explore ways to use resources more efficiently and to develop more effective ways of detecting and prosecuting environmental crimes.

ESA believes that Agency should work more closely with other enforcement agencies like the police and HM Customs and Excise. We also agree with the Jill Dando Institute of Crime Science that the Environment Agency, with many scientists at its disposal, should make greater use of forensic science in tracking offenders.

As highlighted in our written evidence, the Environment Agency should place a greater reliance on operators’ management systems. The next generation of environmental improvement will not be achieved by adding another costly layer of prescription to regulation of industrial process but will be delivered by making more use of operators’ own management systems to meet carefully designed environmental outcomes.

ESA is keen to work with the Environment Agency in developing a “sector plan” and believe that this, combined with the Agency’s own work on the future of regulation, provides an excellent opportunity to modernise and strengthen environmental regulation.

C. ESA’s Code of Conduct

We can confirm that no director of an ESA Member was convicted in a prosecution brought by the Environment Agency in 2003–04.

November 2004

Witnesses: Mr Ric Navarro, Director of Legal Services, Mr Jim Gray, Head of Regulatory Development and Mr David Stott, Chief Prosecutor, Environment Agency, examined.

Q102 Chairman: I am extremely grateful to you. It just seemed to be sensible since you were still here. Two immediate issues arose out of that session: one was to do with construction waste, where clearly what one might call the reputable parts of the industry do not seem to be interested in dealing with it and it would be very helpful to have your views as to who is dealing with that. The other is the question of hazardous waste which appears to be disappearing. If we could have your thoughts on that, it would be helpful as well. We do appreciate that this is not something you were expecting to be asked about. We shall nonetheless listen with great care.

Mr Navarro: That is certainly true. We do not have our waste experts with us and I am sure they would be able to give a much better picture. We were very interested to hear the evidence from ESA and it does raise worrying concerns which we were grateful to hear.

Mr Stott: May I pick up on construction waste first, because that is the issue I mentioned earlier in terms of proceeds of crime? Three of the cases are concerned with that and around the Thames region. They are inter-regional—I do not want to give too much detail—and we are very conscious and aware of the scale of this. There are many operators who change identities, who change vehicle registrations, so they are very difficult to track down, but we are close and hope to bring the cases to court next year.

Q103 Chairman: They have overseas registration as well, do they not?

Mr Stott: They do.

Q104 Chairman: I think I know one of them.

Mr Stott: In terms of the hazardous waste, we are conscious of what has been said and we have started an operation to look at a certain aspect in the chain of the disposal of hazardous waste where we are going to run quite a sophisticated exercise to see just what is happening and how they are dealing with it. I would not like to say too much, but we are aware and we are trying to take steps to combat that.

Q105 Sue Doughty: You talked about one or two of those cases but what we know as a Committee is that in fact the disposal sites for hazardous waste and various types of hazardous waste, particularly in Wales and the South East, are practically non-existent. That is why I am surprised that although you have referred to some events, and we are all beginning, as constituency MPs, to have farmers and councils coming to us saying that this is getting to be a real problem, yet it sounds a little bit quiet from your end. It is corporate waste; it is companies dumping this stuff by and large. In particular, since 17 July, when the end of co-disposal came in, it would be very interesting to know whether you have seen many more incidences, or whether you have any metrics on this, or whether you think it is still working through, in respect of this question of where the missing hazardous waste is.

Mr Stott: We are taking an active exercise. I am trying to choose my words carefully, because we are running quite a sophisticated operation to discover what advice those people involved in the chain are giving and where it is going to.

Mr Navarro: Generally we are looking at the question. We are, of course, interested in this and we have been looking at this on a weekly, fortnightly, basis.

Q106 Sue Doughty: Have you seen more incidences? I do not want you to explain what you are doing as part of the investigation, as I quite appreciate the delicacy.
Mr Gray: There are incidences of fly-tipping, particularly in the North East and North West, the examples which David gave before. We are monitoring and keeping an eye on the number of incidences. We are not seeing huge rises. The incidences we are seeing tend to be quite minor ones. In terms of where it is going, since July—just some off-the-cuff figures—we were getting 500 phone calls a week in June and July to our call centre but we are now getting 10 or 20 a week. So the number of enquiries has dropped very markedly. During June and July, we did about 500 audits out there on the ground of the major streams. We have been concentrating on three streams: contaminated soils, asbestos and the tarry, oily waste. Those are the ones where we predicted there would be big capacity shortfalls. Between July and now, more landfill capacity has come on stream. A number of non-hazardous cells, the stable non-reactive cells, are now in place, so there is capacity for about 0.3 million tonnes—if I have the figures right—of asbestos which was not there back in July. I know there are geographic issues, but if you just look across England and Wales, the landfill capacity situation does seem better now than it did three or four months ago. That is one factor. In terms of capacity for asbestos, it is better now than it was in July. The real problem is just the volumes of contaminated soil and where that has gone. What I am hearing is that gate prices are going up, so was the consigning ahead of time. I am also hearing that a lot of soils was consigned before as hazardous waste, contaminated remediation stuff which was consigned as hazardous waste, which now would not be because more segregation is taking place; soils are still being consigned, but they are being consigned as non-hazardous waste, because more segregation is taking place. There is a developing picture and we are doing a lot more work here. We have regions reporting weekly at the moment, so we are monitoring this and we are looking to do a number of operations in the coming months. We have also run a number of campaigns on vehicles stop and searches. We have been doing a lot on the ground and there is more coming. In terms of answering the absolute question precisely as to where it is, we do not have real-time, day-by-day, week-by-week, month-by-month data. It is all in arrears, apart from the fly-tipping, which is fairly real time. The stats from that show very modest, slight increases; there have been about 30 or so events which stick in my mind, asbestos-type things, but not big scale, not the scale you were talking about before, that would explain the missing million tonnes a year or whatever the gap is that you were referring to before. I hope that helps. It is not a definitive answer.

Q107 Chairman: No, but it is helpful. Thank you very much and I am sorry to have sprung that on you across England and Wales, the landfill capacity situation does seem better now than it did three or four months ago. That is one factor. In terms of capacity for asbestos, it is better now than it was in July. The real problem is just the volumes of contaminated soil and where that has gone. What I am hearing is that gate prices are going up, so was the consigning ahead of time. I am also hearing that a lot of soils was consigned before as hazardous waste, contaminated remediation stuff which was consigned as hazardous waste, which now would not be because more segregation is taking place; soils are still being consigned, but they are being consigned as non-hazardous waste, because more segregation is taking place. There is a developing picture and we are doing a lot more work here. We have regions reporting weekly at the moment, so we are monitoring this and we are looking to do a number of operations in the coming months. We have also run a number of campaigns on vehicles stop and searches. We have been doing a lot on the ground and there is more coming. In terms of answering the absolute question precisely as to where it is, we do not have real-time, day-by-day, week-by-week, month-by-month data. It is all in arrears, apart from the fly-tipping, which is fairly real time. The stats from that show very modest, slight increases; there have been about 30 or so events which stick in my mind, asbestos-type things, but not big scale, not the scale you were talking about before, that would explain the missing million tonnes a year or whatever the gap is that you were referring to before. I hope that helps. It is not a definitive answer.

Mr Navarro: Perhaps we could write to you to give you more information on this aspect.
Q109 Chairman: Good morning, gentlemen. Thank you very much indeed for coming along. As you know, we are conducting an inquiry into environmental crime and we are looking at the whole regulatory regime. It will come as no surprise to you to hear that you are here because you have had trouble with the regulator, and have been fingered, as it were, as repeat offenders in the past. We are therefore particularly interested in hearing your reaction to the whole process in which you have been involved. Thames Water particularly appears to have had considerable difficulties, although some water companies, according to the Environment Agency in Spotlight have been able to improve their performance. Thames has had particular difficulty in doing so. Is there a particular reason for that?

Mr Sexton: Mr Chairman, can I start with a little bit of context about the scale of the water industry and what we are doing in this area? You appreciate that we are collecting waste from domestic and industrial premises. We cover a large geographical area and have a huge number of individual facilities. We have nearly 70,000 km of sewers and 13 million customers connected. We have nearly 2,500 remote pumping stations. The system has to take waste from domestic and industrial consumers. We have no control over the inputs to that area, and therefore there is always going to be much, much more risk of incidents happening over a large network than there is, for example, in a normal industrial process where you have a single site where you are in control of your premises and the activities going on. The Environment Agency recognised that when they appeared before you in January. As far as our historical record is concerned, the Environment Agency has publicly, and privately in meetings with us and Ofwat, confirmed that our environmental performance has improved considerably. If you look at the number of incidents, there are a number of different factors involved. There is a clear weather-related factor because our weather hugely influences overflows from the system. You will appreciate that the law as it stands gives us strict liability if there is any overflow from the system into a river, and even where there are third-party blockages. In law we are responsible, and we cannot put up a due diligence defence. If an incident happens, we have to plead guilty, and it is about mitigation in court. We have a very complex system to operate, and it is our job to do that well—I am not saying anything other than that. The Environment Agency has changed its approach to classification of incidents and the number of prosecutions that they take. If you look in the year covered in that report, we had 40 incidents during that year. This year is considerably below that, but trends have been upward and in our case particularly because they changed the way they categorise incidents on the Tideway in London.

Q110 Chairman: Is there reason to believe that although the number of incidents is going down, they are getting more serious? There was that notorious incident, was there not, on 3 August, of 600,000 tonnes of raw sewage ending up in the Thames?

Mr Sexton: On the first point, Chairman, there is no suggestion at all that the incidents are getting more serious. There will occasionally be more serious ones, and that is in the nature of it; but there was no upward trend in the seriousness of the incidents.

Q111 Chairman: There is no downward trend either, is there? I see that the Mayor of London has been taking a close interest in this, and there are reports that up to 20 million tonnes of raw sewage continues to be flushed into the Thames because the system cannot cope. Is that going to continue for the foreseeable future?

Mr Sexton: Yes, it will. It is very, very different to the types of incidents that are normally the matter for prosecutions and reporting in Spotlight. The Thames Tideway suffers from over 50 overflows to the tidal river. That is how the system was designed in Victorian times, and it is how it still operates today. Those discharges are legally made, and it is exactly how the system is designed to operate.

Q112 Chairman: Do you think it is right that it is legal to pump 20 million tonnes of raw sewage into the Thames?

Mr Sexton: I believe it is absolutely right that it is legal at this moment in time because the system is operating as it was designed to do. Prior to privatisation we raised the issue that the situation with the Tideway was totally unsatisfactory; that it needed considerable investment to remedy. We have raised it at each of the price reviews with Ofwat, and five years ago Ofwat funded a combined study of ourselves, GLA, Ofwat, Defra and riparian boroughs, looking at what the solution should be to this. That group has reported and has come up with a scheme of the order of £2 billion. Investment is needed to intercept these sewers that discharge. That is a huge investment, and a decision whether or not
to proceed with an investment such as that is one for ministers. I believe that that situation should not continue. The investment does need to be made. I repeat that it would be outrageous for us to be prosecuted in those cases, when the system is operating as it was designed to do, and when it is completely legal because they are consented discharges.

Q113 Chairman: To what extent do you think that climate change may add to your problems, with rising water levels and wetter weather generally?
Mr Sexton: The increasing intensity of short duration storms inevitably puts a load on the sewerage system. There are other factors as well. The urbanisation in London, with much less green areas for run-off so that the water goes into the sewers and peaks so that it arrives at the same time, and the increase in population, are putting increasing load on the sewerage system. It needs a lot of investment to make sure it is upgraded to what I believe is right and proper for the 21st century.

Q114 Chairman: It sounds to me as though it is likely to get worse rather than better.
Mr Sexton: The downward trend is for it to get worse, and will require these very significant investments to be made to put the situation in a state where it ought to be for London.

Q115 Chairman: There has been talk of running a big pipe down the length of the Thames. Is that something that is under active consideration?
Mr Sexton: That is effectively the solution to this problem.

Q116 Chairman: Does that not mean that it just ends up at Southend or somewhere else? On the whole, we take a pretty poor view of dumping raw sewage in the sea.
Mr Sexton: At the moment, when the rainfall is excessive, these overflows discharge into the River Thames. The proposal is to intercept those overflows and to build a tunnel that more or less follows the route of the Thames. That tunnel would be huge, several metres across, and provides storage as well as a route; and then it would be routed through our treatment works at Beckton and Crossness. When these events happen the sewage is dilute because we are talking about a huge amount of rainfall, and that would be treated then at our existing works at Beckton and Crossness. There is no doubt at all that it produces a solution to the problem; but because of the £2 billion price-tag on it, it is obviously something that is a matter for ministers to decide whether that investment is necessary.

Q117 Mr Challen: It sounds as though there is under capacity or unused capacity at your existing sewage treatment plant at the place you have just mentioned. Why is that? Why was it built with that capacity, which could be there now to accommodate this pipe’s contents?
Mr Sexton: Sewage works are upgraded to cope with increasing volume. The regulatory regime does not allow you to create a huge amount of excess capacity in case it is needed, and at each of the five-yearly price reviews we were putting proposals for increasing the flow to treatment. In the draft determination published in August, they have allowed for considerable increase in the capacity of our sewage works discharging into the Tideway, but the issues causing the pollution events we had in August are about the network, the pipes and tunnels that lead to the sewage works. We have to get it rising water levels and wetter weather generally? there. Those pipes have a finite capacity, and when they are full they overflow into the River Thames.

Q118 Mr Challen: Obviously, it is 100 or 150 years since the Victorians built all these tunnels in the first place. When was this problem first highlighted?
Mr Sexton: I am very aware that in the late eighties it was highlighted. A temporary solution was agreed then. I used to put the Thames Water Authority corporate plan into government in my previous role. It was highlighted there, and a temporary solution was put forward, rather than tackling the problem. That temporary solution is still used today, which is to have bubblers, boats that pump pure oxygen into the river, to try and reduce the damaging effect of the discharge. That was deemed to be an appropriate solution, and that is still deemed to be an appropriate solution.

Q119 Chairman: How many years do you suspect it will take before we get a proper solution to this problem?
Mr Sexton: Once a decision has been made to proceed, because of the scale of the problem it is anticipated it will take four to five years to do the detailed design and to get planning permissions and to acquire land, because it is from Richmond right through the centre of London. A tunnel of that size is estimated to be eight to 10 years to construct. It is much more complex than the Channel Tunnel, for example. It is a huge engineering scheme, which is why it is so expensive. It is not a trivial decision to make whether it should happen, but it is one that we are supporting.

Q120 Chairman: If the Channel Tunnel is anything to go by it will cost a lot more than £2 billion as well.
Mr Sexton: That is of course a risk, yes.

Q121 Chairman: Can we bring in Anglian water at this point, because you have also been described by the Environment Agency as a repeat offender, although I notice you have managed to reduce the number of incidents more recently. However, there was one involving the River Mimram (which is close to my heart because it runs past the end of my in-laws’ garden in Hertfordshire). How do you manage to reduce the number of incidents, or is it just luck?
Mr Pointer: It is a question of risk management in truth, Chairman. Can I say in opening that nobody condones pollution. I would never willingly or knowingly pollute in any direction in the environment. We have a long track record,
particularly since privatisation, both in Anglian Water and in the industry generally of making significant improvements; and these are acknowledged by the Environment Agency. On the one hand we are “repeat offenders” but on the other hand it must be acknowledged that there have been billions of pound invested made in improving the ongoing discharges, not discrete discharges but the flows from sewage treatment works, pumping stations and the like.

Q122 Chairman: Can you put a figure on it?  
Mr Pointer: In the last five years my own organisation has spent £1.5 billion of capital investment in the water and wastewater environment.

Q123 Chairman: This is interesting because it puts the costs of Thames’s problem into a bit of perspective, does it not?  
Mr Pointer: Yes. We are talking big sums of money, and we are talking of improvements going forward beyond what is already a very, very satisfactory wastewater environment. The Environment Agency will acknowledge that the rivers in East Anglia—and I believe that to be the case in the UK—are better now than they were before the Industrial Revolution. The bathing water has been transformed. You mentioned earlier that we do not now discharge raw sewage to sea; that was a big issue for us 15 years ago and has been stopped completely. This is bringing both the environment back into good shape, and it is a good driver of tourism and the economy generally. On the prosecution side it is very disappointing. As John Sexton said, we have strict liability. If a discharge occurs from one of our systems, and it is patently obviously sewage or arising from sewage, there is no defence; we are liable. I am sure John would confirm that we invariably plead guilty when such an event occurs. The way we have tackled bringing this activity down is by having a robust telemetry system, where we monitor all of our sites. As you and your colleagues will realise, very, very few of these sites are manned 24 hours a day because it is just not a practical proposition, and so we have invested heavily in telemetry and instrumentation to try and detect when things might be getting out of kilter, or a spillage is occurring. The other areas to address are solid management reporting systems. Again, in my own organisation—and I am sure it is industry standard—if pollution does arise and we become aware of it from any source whatsoever, we are quickly on to that pollution. The first duty of the management team locally is to stop it happening, and they will then inform their boss or team leader to get reinforcements to stop this being the case. They will then immediately notify the Environment Agency so that they can mobilise their resources and assess whether there are significant environmental issues arising from this. We have always demonstrated, notwithstanding we are likely to be prosecuted, a very open and transparent approach.

Q124 Chairman: We hope to come on to your relationship with the Environment Agency.  
Mr Pointer: We welcome documents like Spotlight because it has been a very good publication to bring together the data, so that there is an objective measurement of progress made; and I am delighted to see that progress is being made.

Q125 Chairman: There is an element of naming and shaming. Do you welcome that?  
Mr Pointer: I welcome the fact that it is an objective report, based on agreed data; and companies can see where they are making progress. In the copy you have, the Agency mentions that for three companies, my own being one, there are fewer incidents, and they are very pleased to see that these companies direct management resources to that aim—and that is what I will always do.

Q126 Gregory Barker: When these discharges lead to offences, and the offences lead in turn to serious penalties, what impact does that have upon the corporate reputation?  
Mr Sexton: Every single incident is one that we regret, and I confirm totally what my colleague has said; that the first concern is to stop a leak, a continuation event, and clean it up. That clean-up operation is usually very expensive. We then move on to re-stocking with fish, and that is the normal response. Any incident hits us that way. Secondly, the fine itself of course is a huge issue, but then there is the reputational damage arising from it and the matter of pride: every time an incident happens, and not just those that are prosecuted, the organisation hurts. None of us want to cause damage; we are here collecting the waste from society, treating it and trying to dispose of it safely. The type of people that are attracted to our business are predominantly people who are environmentally aware and are concerned. All these factors together cause damage. There is no doubt that it has impacted on overseas operations that parts of my group deal with. When we try to buy companies in the US, our pollution record and our prosecution record is actively used against us. Other countries find it difficult, because I do not believe any other country operates on the strict liability regime that we have, that there is no defence in law, and with a prosecuting authority that actually takes action. Sometimes the law is equally strict but it is not enforced, and other countries find it very difficult. All in all, these combined issues have a huge impact. There is absolutely no benefit to us in continuing these activities, and we want to prevent them. That is what we are working towards.

Q127 Gregory Barker: Is there a sense that these things are self-criticism, or is it a worry that you are falling behind your competitors, or that you may lose competitive advantage versus other people in the industry?  
Mr Sexton: Both factors are there. I just repeat the word “pride”: people are damaged by these actions. They do not want to have an environmental
incident. We are here to prevent damage to the environment, and that is what we do, day in, day out.

Q128 Gregory Barker: You told us earlier that the incidents are not increasing in number of seriousness, but they are a regular occurrence and they have not shown signs of a measured decrease either, so is this just something you live with?

Mr Sexton: No, it is not. In terms of basic incidents, we make huge efforts—and I am sure it is the same for all the other companies—in trying to reduce the number of incidents. We have a much more sophisticated control room these days, much more telemetry on site. In the end, we are often talking about these incidents happening in bad weather conditions; people have to get to site; they often happen in multiple; you get peak problems, and all these factors come together to cause an incident. Many are caused by blockages over which we have no control. We have to accept that occasional incidents will happen. Our job is to make sure that ones where there is a systemic fault are dealt with and resolved, and that when incidents do happen we respond quickly and help clean up the environment and make improvements. That is where our focus is.

Mr Pointer: There is a very big reputation issue. It is a very big driver within the business, but also our economic regulator, Ofwat, takes measure of service performance regularly from the companies, and he is able to reflect this in potential determinations under the periodic review process; so this can hit really hard for bad performance. Coming back to Spotlight, the Agency now relates these incidents that you talk about to the population served, and this puts it into context. In my own organisation, it is 1.6 incidents per annum per million population. In the context of our operation, in Anglian Water we have 5,500 installations, whether sewage treatment works or pumping stations, each one of which could go wrong at any time and give rise to pollution. In the context, this is at the margin, and regrettable though it is and strive though we might to prevent it happening, it is almost inevitable when there is an infrastructure that is required to receive and treat everything that is thrown at it. As we said earlier in this discussion, when heavy rainstorms occur, the volume multiples going through these pipes can be 10-20 times what would be the normal flow rates. Obviously, strength again can vary markedly with trade effluent and discharges and so on, as mentioned earlier; so you have a very, very wide range of inputs, all of which have to be treated to some of the highest standards in the world. These standards continue to increase. As we have been proud to achieve the quality improvements, of course the very standards of the consents also get more stringent, and therefore breaches will occur more easily.

Q129 Chairman: Do you think the law is too strict and the regulations rather too stringent?

Mr Sexton: I think there are areas where it is but we support tight regulation and clear laws that are uniformly enforced. My personal view, not being able to put a due diligence offence together, where we have had third-party actions where a manhole has overflowed due to a blockage and we are prosecuted, is going to the extreme where the law enables the Environment Agency to take actions that I do not think are helpful.

Q130 Chairman: There is a case for saying that the law is too strict; that you are regularly in breach of it, which suggests that you are bringing the law into disrepute. Mr Sexton: You need a balance between the law, its enforcement, and agreement to the investment that is needed to improve the system: these things all have to be in balance. We have talked earlier of the Thames tidal problem, where the investment has not been in balance with what reasonable environmental obligations ought to be; but there are other areas where enforcement by the Environment Agency is very heavy handed, whereas if we could have a due diligence defence there is a good chance that a fine would not be something that warranted a guilty decision.

Q131 Chairman: Have each of you totted up the number of fines you have had in the last five years, and the value of those?

Mr Sexton: Yes, we have been averaging about five prosecutions a year since privatisation.

Mr Pointer: For us it was £50,000 last year, and in the 40s this year.

Q133 Mr Sexton: Last year it was about £70,000 and it has been lower than that, but in the last few years it has been a similar amount.

Mr Pointer: For us it was £50,000 last year, and in the 40s this year.

Q132 Chairman: What was the value of the fines paid?

Mr Sexton: Last year it was £70,000 and it has been lower than that, but in the last few years it has been a similar amount.

Mr Pointer: For us it was £50,000 last year, and in the 40s this year.

Q133 Chairman: What is your turnover?

Mr Pointer: At the moment about £750 million.

Mr Sexton: Ours is about £1.1 billion.

Q134 Chairman: So the value of fines in relation to the size of your companies is pilfering!

Mr Sexton: The value of the fines is, but as I explained earlier, that is just one element in the concerns we have about the incidents. Clearly, on its own that would not be a deterrent, but it is not wilfully made; these are events that we are trying hard to prevent.

Q135 Gregory Barker: Do you think that the offences where there is a penalty involved recognise the difference between poor management and systemic failure? Obviously, you have a competitive situation in the UK; some companies are well managed, and others less well managed. Some have, individually, poor managers. Do you think the law is rooting out poor management, or is it just responding to a Victorian infrastructure?

Mr Sexton: Personally, I think both elements are there. There is no doubt that with some of the incidents we would have to say that in a wider sense there was management failure, where we have not responded quick enough and where we may think
there is good mitigation but nevertheless we ought to be able to cope with. There are other cases where it is absolutely nothing to do with us, and yet we still have an action taken against us. Both elements are present.

**Mr Pointer:** The UK is a model in terms of regulation. We have very strong regulation in drinking water, and that is how it should be—and we are a model, I believe. We have a very strong and powerful economic regulator and we have a very strong environmental regulator. I absolutely support that. When we are operating in this area, however, the cases need to be judged on a case-by-case basis and on the merits and demerits of the action taken. We are that thin green line between the effects of society and the environment. We are prosecuted for failing to maintain that green line in a way, and that is a rather different complexion in my judgment from somebody who knowingly or grossly pollutes the aquatic or agricultural environment.

**Q136 Mr Challen:** Can you think of any cases where it is cheaper to pay the fine than to sort the problem out?

**Mr Pointer:** It is never an attitude that I would support. This is a criminal prosecution and a fine should represent the culpability of the company or the individuals concerned.

**Q137 Mr Challen:** It is not really a punishment, is it; it is just a business expense?

**Mr Pointer:** It is a punishment to the extent of the publicity that is generated. There is potential reputation damage, and also the potential for the regulator generally to take a hostile view of the company.

**Q138 Mr Challen:** The customers are not going to say, “Thames or Anglia was fined today, so tomorrow I will change my supplier”; they cannot do that, can they? Therefore, what difference does damage to your reputation make?

**Mr Pointer:** You are right that the customer in the broad instance cannot change supplier, but through the regulatory system and through WaterVoice, which looks after customers’ interests, and the Agency and the other regulators that can be brought to bear in the regulatory arrangements we have.

**Mr Sexton:** The effect on commercial businesses elsewhere in our group is marked and very well documented. In the US, where we have been trying to become involved in other contracts, our prosecution record is invariably brought up by people who are opposed to it, and it has led to loss of business. It is a huge deterrent.

**Q139 Chairman:** I was going to ask you as to the extent these cases feed through to investor confidence and the City, but you have answered that.

**Mr Sexton:** Yes.

**Q140 Mr Challen:** The Environment Agency said they had detected a change in attitude in some of the major operators in the water and waste industries and that in general there was more challenge to the activities of the agency; for example, in refusing to provide representatives to attend for interviews, and challenging legal definitions like the definition of “waste”. This may be in an attempt to avoid liability due to increased shareholder awareness of environmental responsibilities or because of the adverse impacts on cost, reputation, et cetera. Do you recognise that statement?

**Mr Sexton:** On behalf of Thames, absolutely not. There are examples of that are true. If you take new legislation, we have been pursuing and interpreting new legislation. We have a case at the moment concerning sludge, where there are regulations over the control of sludge and the Environment Agency has sought to bring an action under the waste regulation. We have challenged whether that is legal to do so, and whether sludge is covered by the legislation. There are examples like that where we will pursue a case with the Agency.

**Q141 Mr Challen:** Have you tried to co-operate with them first on this issue?

**Mr Sexton:** Absolutely.

**Q142 Mr Challen:** They are not being co-operative themselves.

**Mr Sexton:** The Environment Agency agrees that we co-operate with them. The times they say we do not co-operate are when they are trying to decide whether or not to take a case against us. On prevention of offences we have regular workshops at the working level on how we ought to operate the system, and how we should respond when incidents happen. We co-operate fully with them. They have actually praised us for the progress we have made over the years and the consistent improvements that we have made. When it comes to an incident, we always co-operate on clean-up; either of us will take the lead and we will support one another. We have never had complaints from them about that. When it comes to whether or not they are considering taking action, they admit themselves that they have changed their attitude. They classify more things now as incidents.

**Q143 Mr Challen:** You are saying they are taking a tougher attitude.

**Mr Sexton:** Without doubt.

**Q144 Mr Challen:** Do you think that is right?

**Mr Sexton:** I think it is right where the causes are things that are reasonably under the control of management. If environmental damage takes place, of course that is the right thing to do.

**Q145 Mr Challen:** What about Anglian Water?

**Mr Pointer:** I am surprised and disappointed by that statement, frankly, because we have always operated a very open, transparent and compliant role with the agency. We have no policy of non-attendance at interviews. Where we have received some criticism directly from the Agency is presenting people at interview who are not fully apprised of all the facts, and to assist that we have said that if the Agency were to give us a list of the questions they wished us
to answer on an event of pollution, we would provide a comprehensive response to that in writing that they can use for their own purposes. I have found recently that that has been a productive way forward. I learnt about this evidence that had been provided to you only in the last 10 days, and so concerned was I that we have already made contact with the chief prosecutor at the Agency with a view to getting a high-level meeting to understand exactly where their complaint lies in this respect, because there is no way in which I want to preclude any organisation that is seen to be not operating in any case of potential prosecution. Added to that, as we have said a couple of times already in this interview, is the fact that we have strict liability for this event anyway. Once a discharge is aligned to one of our assets, the case is almost proven, and almost invariably we plead guilty.

Mr Sexton: We are working locally with the Environment Agency on a protocol to deal with this, so that it is absolutely clear what they expect us to do and how we will react. That is why I am really surprised to see this coming from their national centre.

Q146 Mr Challen: Both of your companies are aware that the Environment Agency specifically named your companies in this regard as being somewhat obstructive.

Mr Pointer: Through the evidence provided to you.

Q147 Mr Challen: That is right, and you are taking that up with them.

Mr Pointer: Yes. I am also concurrently Chairman of WaterUK, which is the industry representative body, and I intend that WaterUK should also engage with the Agency on this important topic.

Q148 Mr Challen: Are there any cases ongoing at the moment where this charge might be levied at you, do you think?

Mr Sexton: I am trying to think of one current. There are one or two where there are some interesting issues, but our general approach is that we always require our staff to co-operate. Because the Agency has legal powers of prosecution and can take action against only the company as against individuals, we have always said to staff, “if you are being asked to give evidence under caution or under statutory compulsion”—which the EA has powers to do “you should always ask if you can have a lawyer present”. It would not normally be a company one because there could be a risk of an action against an individual. If they cannot do that, they can ask to have someone else accompany them so that they can keep a record. We have never instructed people not to give a statement under compulsion. Under caution, we have always said we would co-operate, but the dangers we see of the Environment Agency rushing in to take a statement under caution is that they can be misleading because they go to anybody, whether a contractor or a junior person on the site, or a manager, and it happens during the course of an incident. We find that particularly concerning when our efforts are on trying to control the incident.

Q149 Mr Challen: Why should you be treated any differently from anybody else who faces an inquiry of a judicial nature? If I were on a charge and had to go to court, if I said to the judge, “I would prefer it if I was given the questions in writing before I answered them, so do you mind doing that?” I would probably be told I was in contempt; or I would be laughed out of court. Why should you be treated differently to other bodies that face potential prosecutions of a serious nature?

Mr Sexton: We are not asking to be treated differently.

Q150 Mr Challen: One of you said that your approach was to ask for questions in writing, and that might have some justification. I am not saying that in a preliminary state of inquiry it is unreasonable to ask for that. Clearly, if they say that is how they are going to do it, and they have that power, and you are saying you want it in writing and having all these legal quibbles about it—

Mr Pointer: I made that comment, and I made it because when we have attended these interviews before we have been criticised that we have not been able to give them the information they require, because they ask questions on a very wide spectrum, as you would imagine: they are trying to understand the network, the management actions, the operation telemetry and so on. I come back to the point that even before we would get to an interview, the fact is that the discharge is almost certainly to have been linked to one of our assets, and so under the strict liability position—which is rather different from another court case—we almost have to plead guilty.

Q151 Mr Challen: So it is not a question of trying to wear them down with to-ing and fro-ing and a bit of—

Mr Pointer: Absolutely not. It is trying to get the facts properly recorded so that both parties understand what has gone on at that site.

Q152 Gregory Barker: It all comes back to the issue of reputation and management. Do these investigations and penalties impact materially on your share price, or on your overall cost of capital so that it makes it more expensive for you to raise money and perhaps in the longer term undermines your ability to raise the capital necessary to invest in long-term infrastructure?

Mr Sexton: It would not in the short term but could in the longer term, and I repeat the examples I have used before about affecting commercial business and commercial growth, but they are not as far as the utility, the regulated business.

Q153 Gregory Barker: Your share price is not very sensitive to these things.
Mr Sexton: We are part of a bigger group anyway, and therefore the share price is from a national body, and therefore performance of the utility in the UK is only a small part of it.

Q154 Gregory Barker: The borrowings presumably secured against your particular company are not more expensive as a result of these issues.

Mr Sexton: I am not aware that there is a direct feedback.

Mr Pointer: There may be some long-term implications in that respect. It has to be said that we are judged by reputation, as any other company; and the effects of these events and the general publicity is a bad news story for the company. It is one blot on what is a very strong, powerful record of improvement, particularly over the last 15 years.

Q155 Chairman: You are a bit different from other companies. You have a captive consumer base. If somebody took the view that putting 20 million tonnes of raw sewage into the Thames every year is a bad idea, they could not do much about it, could they, unless they go and buy Buxton water, or Perrier if they are unpatriotic?

Mr Sexton: That can of course not be but they could interact with politicians to get the situation changed.

Q156 Chairman: To the extent that you have that captive market, you are not susceptible to the usual pressures of consumer choice, are you?

Mr Pointer: That is a fair comment.

Mr Sexton: I absolutely agree with that.

Q157 Chairman: Which means that it is not unreasonable that there should be a stringent regulatory regime in which to operate.

Mr Pointer: As I said earlier, from the law and from regulation. The law at the moment, being the criminal law, is a very powerful weapon because in extremis normally these cases are dealt with through the magistrates’ courts but some of them can go to the Crown court where the penalty is unlimited fines and potentially imprisonment. There is a very powerful legal structure around it. We need further dialogue with the Agency as to how that law is policed and implemented, where there will be differences of view, and obviously issues that have arisen over the last several days.

Q158 Chairman: I wish you well in your dialogue with the Agency. We will be very interested to find out how that misunderstanding appears to have arisen and whether or not it is going to be resolved. We will be looking at that. Neither of you has sent us evidence on this inquiry. There were some specific questions in the press release that we issued, and it would be extremely helpful to us if you could briefly set out in writing a response to the questions.

Mr Sexton: We will be pleased to do so.

Supplementary memorandum from Anglian Waters Services Limited (“Anglian Water”)

INTRODUCTION

1. Whilst taking evidence on 28 October 2004 from representatives of Anglian Water the Chairman of the Environmental Audit Sub-Committee on Corporate Environmental Crime invited Anglian Water to file written evidence in response to the press release of July 2004. The purpose of this memorandum is therefore to respond to the issues raised in the press release. In addition, Anglian Water has taken the opportunity, within this note, to respond to comments made by the Environment Agency in previous evidence on the level of co-operation between the two organisations.

BACKGROUND

2. Before the principle questions raised by the Committee are addressed it is important to put into context the nature and size of Anglian Water’s wastewater operations.

3. Anglian Water collects waste from domestic and industrial premises in a geographical area covering 20% of England and Wales. The operation consists of 35,000 km of sewers, 1,077 Wastewater Treatment Works and 4,404 Wastewater Pumping Stations. The system has to take waste from all over the geographic area and Anglian Water has no control over the inputs to the system, it simply has to treat all inputs.

4. Anglian Water in the operation of its wastewater business strives to avoid pollution. The company is the “thin green line” that protects the environment from the impact of society as it discharges its liquid waste into the sewer network. Environmental improvement is a priority that Anglian Water takes very seriously. The Environment Agency acknowledge these efforts in their “Spotlight on business” report for 2003 stating, “Anglian Water, Wessex Water and Dwr Cymru all had fewer pollution incidents this year. We are pleased to see these companies continue to direct management and operational attention at reducing their number of serious pollution incidents. These companies show that improvement is possible, even within present budget constraints.”

5. Since privatisation Anglian Water has invested over £3 billion of capital investment in the water and wastewater environment. This has led to:
— best bathing waters in the UK (100% mandatory compliance six times out of the last eight summers and 17% of Blue Flags in England and Wales from 10% of bathing waters);
— cleanest river water quality since before the industrial revolution (98% very good to fair)
— lowest leakage rate in England and Wales; and
— consistent high quality of drinking water, with the best results ever reported in the Drinking Water Inspectorate’s report July 2004.

6. A further programme of £0.7 billion improvement schemes has been targeted for 2005–10 and submitted to Ofwat for approval.

Do the bodies responsible for investigating and prosecuting corporate environmental crime have sufficient powers and resources to do so? Are they able to conduct robust and effective investigations into the source of the crime and mount effective prosecutions that target those who are responsible for the crime, as well as the person actually committing it?


8. In particular, section 108 of the Environment Act 1995 sets out specific powers for enforcing authorities and persons authorised by them. The powers include, inter alia, powers of entry, power to carry out investigations, take photographs, recordings, samples, production of records and to require persons to give information. To buttress these strong powers the Environment Act 1995 also provides for an offence of obstruction under section 110.

9. In addition to the powers conferred by section 108 of the Environment Act 1995 another specific power granted to the Environment Agency is under section 202 of the Water Resources Act 1991 under which the Environment Agency has power to gain information/assistance required in connection with the control of pollution.

10. Consequently it can be seen, as the Environment Agency indeed stated before the Committee in its previous evidence, that its investigatory powers are sufficient to conduct robust and effective investigations into the source of pollution incidents.

11. As regards mounting effective prosecutions, that is a separate matter. There is a perception that the Environment Agency are not prosecuting fairly and consistently across industries and that the water industry is a point of primary focus for the Environment Agency. The table attached at Annex 1 compares the number of prosecutions taken by the Environment Agency across various industries. The water industry has the highest number of cases (135) brought against it by the Environment Agency that is almost 100% more than the next highest sector, agriculture (72).

12. So far as tackling the person responsible for and actually committing the pollution, it must be borne in mind that in the water industry the offences imposed under the Water Resources Act 1991 are of strict liability. Consequently if a discharge occurs from part of Anglian Water’s wastewater system and it is obviously sewage or arising from sewage, there is no defence. The Environment Agency does not need to prove causation to mount a prosecution against the water company.

13. Because of this strict liability it is easier for the Environment Agency to prosecute the water companies rather than a third party who may have put the polluting matter into the system in the first place.

Are the penalties for corporate environmental offences adequate? If not, how can penalties and punishments be better targeted to ensure that the criminal justice system is effective in acting as a deterrent?

14. The law at the moment, being the criminal law, is a very powerful deterrent.

15. The majority of prosecutions taken by the Environment Agency are in the Magistrates’ Court. As pointed out by the Environment Agency the legislature has increased the level of fine for such offences from the standard £5,000 (applies to non-environmental offences) and increased the maximum fine to £20,000.

16. What has not been explained, however, is the potential for these cases to be commenced in the Crown Court or transferred there by the magistrates for sentencing. Fines are unlimited in the Crown Court.

17. In addition to the above financial penalties there is the potential for sanctions to be taken against Directors and senior managers individually. The Environment Agency accepts in its previous evidence that sentencing powers are broadly sufficient. Anglian Water would say they are sufficient.

18. Within the Anglian Water region the magistrates are very aware of their sentencing powers and are not afraid to impose fines towards the top of their limit. This is illustrated in Annex 2, which show the level of fines imposed upon Anglian Water over the last six years. The evidence here, however, indicates a lack of consistency in the application of fines across the water industry as illustrated by Annex 3. As the Environment Agency accepts in its previous evidence, whilst sentencing powers are broadly sufficient, there is inconsistency in the manner in which the Magistrates applies them.
19. Annexes 1–3 demonstrate a lack of consistency and lack of a level playing field when it comes to dealing with the prosecution of pollution incidents and the sentences handed down. The water industry suffers particularly badly compared to others, which is wrong when taking into account the fact that the nature of any polluting matter is organic which has a short-term environmental impact (usually recovering within a matter of days) than other sources of pollution, for example, oil, toxic chemicals or nuclear waste which are persistent, with the potential to cause long-term damage.

20. Guidelines issued to the magistrates as well as training given to them by the Environment Agency may alleviate the problem of consistency. This should also be reinforced by the clear guidance on sentencing handed down by the Court of Appeal in the cases of Milford Haven Port Authority [2000] 2 Cr App R (S) and R v Yorkshire Water Services Limited [2001] EWCA Crim 2635 where it identified the degree of culpability with the seriousness of the result of the offence (environmental impact) as the critical factors when sentencing.

21. In addition to the financial and personal penalties what must be considered is customer, investor and regulator confidence. Reputation is a very big driver within the water industry and also with the economic regulator, Ofwat, which regularly measures service performance of the companies, and is able to reflect this in potential determinations under the periodic review process. In effect the company is penalised financially by the courts and Ofwat for environmental pollution.

22. Whilst Anglian Water supports this approach to sentencing fines should be based on environmental impact, that is, on the actual harm caused and culpability, not on the financial success or otherwise of a company. Whilst fines are taken from the company’s bottom line, they inevitably have implications for the amounts of money available for discretionary investment, customer services and dividends.

23. Anglian Water’s view is that no further increase in penalties or alternatives is required; the range of penalties for environmental offences, financial and non-financial are adequate. The main issue is their consistent application.

What alternatives, outside the criminal justice system, should be considered for dealing with corporate environmental offences in order to reduce environmental harm by business? Should there be greater use of alternative means of punishment, such as the use of prohibition notices, civil penalties and the confiscation of company assets?

24. Anglian Water’s view is that to reduce environmental harm from business attempts should be made to educate business in prevention rather than wait until an incident has actually occurred and the environment damaged.

25. Aside from increased awareness by business of the consequences of its actions on the environment which could be delivered by the Environment Agency through a series of Government backed initiatives, Anglian Water does not consider that any further methods outside the criminal justice system are required for dealing with corporate environmental offences in order to reduce environmental harm by business.

26. The current system acts as a deterrent but more could be done in terms of prevention. The introduction of alternative penalties would not protect the environment it would only penalise once harm had been committed. The potential to make more use of incentives should be explored.

Are there too many environmental duties and responsibilities on corporate bodies which serve only to stifle their ability to compete in the market place? Are the laws and regulations applied uniformly across the business sector?

27. The UK water industry does not directly compete in the domestic market place; the economic regulator, Ofwat, enforces pseudo competition. However, many companies do compete in the international market place and domestic convictions are actively used against them to prevent the winning of contracts, regardless of the severity of the event.

28. The UK water industry is the most heavily regulated in the world and many of the regulations, as written, apply strict liability on UK water companies.

29. In terms of a risk management approach on the basis that “no spills” is not a practical end position, the issue appears one of probability of spills (low) and impact (usually low). Applying a sustainable development approach suggests that resources would not reasonably be diverted to these causes at the expense of, for example, sewer flooding, water hygiene issues etc.

30. Regarding uniform application of laws and regulations across the business sector it is not as uniform as it ought to be. This is seen at a local level in that different areas of the Environment Agency within the Anglian Water region interpret regulations differently, some areas being much more rigorous in their application than other areas. Anglian Water also has experience of more than one Environment Agency region, and there are noticeable differences in their approach. Greater consistency would be welcomed. As evidenced earlier, the variation in fines demonstrates inconsistency in the application of sentencing by the court. The clear sentencing guidance given to the magistrates and also created by the Court of Appeal will remedy these inconsistencies in due course.
Is the Government doing enough to educate the business sector in terms of their legal obligations with regard to environmental issues which impact on their business? Is there sufficient dialogue and co-operation across Government and the business community to ensure that best practice, for example, can be shared?

31. The UK water industry has a productive trade association, Water UK which liaises with government departments, facilitates working parties and distils knowledge and understanding of obligations throughout the industry.

32. Anglian Water, however, would like to see more positive engagement with the Government and the Environment Agency on preventative initiatives to deter environmental crime rather than punitive measures post the event. In the Environment Agency’s “Spotlight on business” report they refer to their sector plans to work with businesses to integrate the environment with their business strategies. Anglian Water is very keen to work on these and like-minded joint initiatives to bring about further environmental benefits.

Relationship with the Environment Agency

33. Anglian Water has a good relationship with the Environment Agency and is surprised and concerned about the Agency’s perception of Anglian Water’s lack of co-operation and change in attitude towards enforcement activity. Anglian Water has requested an urgent meeting with Barbara Young, Chief Executive of the Environment Agency and David Stott, their Chief Prosecutor to discuss these matters.

34. Anglian Water has always operated an open and transparent policy with the Environment Agency and would wish to draw the Committee’s attention to the following:

— it is Anglian Water’s policy to inform the Environment Agency of all known incidents; the agency has advised the company that it has the best self reporting records in the industry;

— all employees are instructed to fully co-operate with the Agency;

— the company exercises its legitimate rights to challenge the Environment Agency on legal issues and evidential matters;

— Anglian Water does not have a policy of non attendance at formal interviews;

— Anglian Water has always pleaded guilty apart from defending one prosecution, Letchworth. Anglian Water believed it was operating within its consent and the court found in its favour; and

— Anglian Water does not try to avoid the consequences of prosecution but believes it should be prosecuted fairly, competently and with consistency.

Annex 1

The table shows the number of prosecutions reported in the Environment Agency’s press releases from March 2002 to November 2004 for cases of water pollution. Also shown are the number and proportion of cases for each industry type where no fine was given. These cases resulted in either an Absolute Discharge, a Conditional Discharge or a Community Punishment Order.

These data indicate that certain industries are more heavily penalised for pollution offences than others. The water industry has more prosecutions than any other sector.

<table>
<thead>
<tr>
<th>Business type</th>
<th>No. cases</th>
<th>not fined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water</td>
<td>135</td>
<td>0</td>
</tr>
<tr>
<td>Agriculture</td>
<td>72</td>
<td>14 (19.4%)</td>
</tr>
<tr>
<td>Construction</td>
<td>39</td>
<td>2 (5.1%)</td>
</tr>
<tr>
<td>Food processing</td>
<td>38</td>
<td>1 (2.6%)</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>34</td>
<td>0</td>
</tr>
<tr>
<td>Waste management</td>
<td>19</td>
<td>0</td>
</tr>
<tr>
<td>Leisure</td>
<td>19</td>
<td>1 (5.2%)</td>
</tr>
<tr>
<td>Local Authority</td>
<td>8</td>
<td>1 (12.5%)</td>
</tr>
<tr>
<td>Other*</td>
<td>44</td>
<td>1 (2.3%)</td>
</tr>
<tr>
<td>Anglian Water</td>
<td>9</td>
<td>0</td>
</tr>
</tbody>
</table>

* includes hospitals, road and rail transport, airports, shops, fuel suppliers and individuals.
Annex 2

The graph illustrates Anglian Water’s fines over the last six years along with the limit of the magistrates’ fining powers.

Note—these data exclude a £60,000 fine resulting from a private prosecution.

Annex 3

This graph illustrates how Anglian Water’s fines are generally higher than the other water and sewerage companies. These fines are for each offence, not for each case. The chart shows how the vast majority of fines are below £10,000 for each offence, while Anglian Water’s fines are more likely to be much higher. NB Thames Water has had fines of £50,000 and £200,000; these were excluded from the scale of this graph simply for clarity. They have not been excluded from the data analysis.
The mean fine for Anglian Water since 1999 is £15,719 per offence.
The mean fine for the other WSCs in the same period is £6,419 per offence.

The table below shows the fines reported in the Environment Agency’s press releases from March 2002 to November 2004 for cases of water pollution. The fines recorded are per case, not per offence, due to the way that they are usually reported. Also shown are the number and proportion of cases for each industry type where no fine was given. These cases resulted in either an Absolute Discharge, a Conditional Discharge or a Community Punishment Order.

These data indicate that certain industries are more heavily penalised for pollution offences than others. The water industry has more prosecutions than any other sector, with fines at the upper end of the range. Anglian Water’s average fine per case in this period has been by far the highest of all the WSCs.

<table>
<thead>
<tr>
<th>Business type</th>
<th>No. cases</th>
<th>Max fine</th>
<th>Mean fine</th>
<th>not fined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Water</td>
<td>135</td>
<td>£57,000</td>
<td>£9,376.70</td>
<td>0</td>
</tr>
<tr>
<td>Agriculture</td>
<td>72</td>
<td>£15,000</td>
<td>£2,646.53</td>
<td>14 (19.4%)</td>
</tr>
<tr>
<td>Construction</td>
<td>39</td>
<td>£65,000</td>
<td>£5,298.72</td>
<td>2 (5.1%)</td>
</tr>
<tr>
<td>Food processing</td>
<td>38</td>
<td>£75,000</td>
<td>£8,394.74</td>
<td>1 (2.6%)</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>34</td>
<td>£98,000</td>
<td>£10,532.95</td>
<td>0</td>
</tr>
<tr>
<td>Waste management</td>
<td>19</td>
<td>£50,000</td>
<td>£15,605.26</td>
<td>0</td>
</tr>
<tr>
<td>Leisure</td>
<td>19</td>
<td>£20,000</td>
<td>£6,092.11</td>
<td>1 (5.2%)</td>
</tr>
<tr>
<td>Local Authority</td>
<td>8</td>
<td>£12,000</td>
<td>£5,625.00</td>
<td>1 (12.5%)</td>
</tr>
<tr>
<td>Other*</td>
<td>44</td>
<td>£60,000</td>
<td>£8,798.86</td>
<td>1 (2.3%)</td>
</tr>
<tr>
<td>Anglian Water</td>
<td>9</td>
<td>£40,000</td>
<td>£21,489.44</td>
<td>0</td>
</tr>
</tbody>
</table>

* includes hospitals, road and rail transport, airports, shops, fuel suppliers and individuals.

---

**Supplementary memorandum from Thames Water Utilities Limited**

1.0 BACKGROUND

1.1 This memorandum addresses the five questions posed by the House of Commons Environmental Audit Committee Sub-Committee in the initial written notification of their inquiry into Environmental Crime: Corporate Crime. It seeks to compliment the oral evidence provided by John Sexton, Managing Director of Thames Water Utilities, to the Sub-Committee on 28 October 2004.

1.2 Thames Water is the water business of the RWE Group. RWE Thames Water is the world’s third largest water company, supplying water and wastewater services to some 70 million people globally, including in the United Kingdom, Germany and the United States.

1.3 In the UK, Thames Water provides wastewater services to approximately 13 million customers across London and the Thames Valley. Our sewerage operating area stretches from Banbury and Luton in the north, to Crawley and Haslemere in the south, Cirencester in the west and Brentwood in the east.

1.4 Within that operating area Thames Water is responsible for 349 sewerage treatment works, approximately 42,000 miles of sewerage network and 2,246 sewage pumping stations, many of which are located close to rivers and watercourses.

2.0 THE SUB-COMMITTEE’S QUESTIONS

2.1 Do the bodies responsible for investigating and prosecuting corporate environmental crime have sufficient powers and resources to do so? Are they able to conduct robust and effective investigations into the source of the crime and mount effective prosecutions that target those who are responsible for the crime, as well as the person actually committing it?

2.1.1 The powers available are extensive and range from statutory compulsory powers of entry and evidence gathering to the general criminal investigative powers available to all prosecuting authorities in England and Wales. As such, they can and do conduct robust and effective investigations.

2.1.2 Thames Water makes every effort to ensure that all aspects leading to an incident are investigated and a detailed explanation is prepared in order that the Environment Agency and the Court are fully apprised of both the facts and the background.

2.1.3 For Thames Water, co-operation is a fundamental driver in ensuring an effective relationship with the Environment Agency. However, changes of approach at regional level and how those changes are communicated and implemented by the Agency can lead to differing interpretations of how incidents are classified, investigated and enforced. This in turn can lead to different case-by-case responses at regional level by water companies and different levels of prosecution activity and penalties.
2.2 Are the penalties for corporate environmental offences adequate? If not, how can penalties and punishments be better targeted to ensure that the criminal justice system is effective in acting as a deterrent?

2.2.1 The law in respect of pollution of watercourses imposes a virtually strict liability with no due diligence defence—unlike a number of other environmental offences—and water pollution prosecutions are therefore rarely challenged. This coupled with the size of wastewater networks and geographical areas served by sewage treatment works places water companies at a high risk of prosecution in any event.

2.2.2 The legislation provides for fines and custodial sentences for individuals in the Magistrates' Court and for referral of appropriate cases to the Crown Court with additional provision for unlimited fines and custodial sentences for individuals, with the proceeds going to HM Treasury, not “ringed fenced” to the Environment Agency. These fines are in addition to the costs of cleaning up and responding to events incurred by the water company and the Environment Agency which are reimbursed by the water company, as well as restocking or paying for damage to property where this occurs.

2.2.3 These in themselves provide compelling deterrents. However, the resulting conviction record, which unlike the situation for individuals is not “spent” after a period of time, remains with the company and impacts on our reputation and the pride of our employees. This, in turn, influences how our stakeholders perceive our business and the decisions and choices they make which shape our operating environments and growth opportunities, both in the UK and overseas.

2.3 What alternatives, outside the criminal justice system, should be considered for dealing with corporate environmental offences in order to reduce environmental harm by business? Should there be greater use of alternative means of punishment, such as the use of prohibition notices, civil penalties and the confiscation of company assets?

2.3.1 There are other significant deterrents that exist outside the criminal justice system, including the extensive powers of the water industry’s economic regulator Ofwat. These include enforcement orders and as a last resort the revoking of the incumbent’s licence to operate. In addition, there exist separate common law remedies for civil liability for pollution incidents.

2.3.2 There is the risk that financial penalties may so severely undermine a company’s financial position that its ability to operate is undermined. A balance is required between regulation, enforcement and regulatory funding and investment required to maintain and improve networks and assets to minimise the risk of pollution incidents.

2.4 Are there too many environmental duties and responsibilities on corporate bodies which serve only to stifle their ability to compete in the market place? Are the laws and regulations applied uniformly across the business sector?

2.4.1 Management of the water-related environment is the core driver of Thames Water’s business, in partnership with the Environment Agency and other organisations. As such we accept the duties and responsibilities placed upon us and strive to comply fully with them.

2.4.2 It is in the interests of both our company and stakeholders to have an effective, balanced and transparent regulatory framework and we work closely with our quality and economic regulators to achieve this.

2.4.3 As stated in paragraph 2.1.3, our competitiveness and operational efficiency are affected by an inconsistency of approach in the classification, investigation and enforcement of incidents at regional level. This results in individual companies having differing records of enforcement—and records that are not necessarily an accurate reflection of performance.

2.5 Is the Government doing enough to educate the business sector in terms of their legal obligations with regard to environmental issues which impact on their business? Is there sufficient dialogue and co-operation across Government and the business community to ensure that best practice, for example, can be shared?

2.5.1 As a regulated business, Thames Water is fully aware of our legal duties. The environment is at the heart of our business and our reputation and success depends on good environmental performance.

2.5.2 We work closely with Government, our environmental and economic regulators, our colleagues in the water industry, consumer representatives and the wider community to ensure that we comply with our obligations, understand expectations, learn and share best practice. This ranges from local (site) level, to inter-company, national and pan-European levels.

November 2004
Memorandum from the Federation of Small Businesses (FSB)

1. INTRODUCTION

1.1 The Federation of Small Businesses (FSB) welcomes the opportunity of responding to the Environment Audit Committee inquiry on behalf of its 185,000 members. While the FSB does not in anyway condone environmental crime, the FSB acknowledges that due to the low level of awareness of environmental legislations and its requirements, some small businesses may inadvertently contribute to the phenomenon.

1.2 Local environmental quality is important to all in the community. The liveability of an area and the pride that community members have in their locality is fundamental to its prosperity. Small businesses are an integral part of the community and the local economy. They operate in local markets: 48% send the majority of their sales to local markets and employ local people. For these reasons the quality of the local environment is important to the small business owner as both an individual member of the community and as a business whose prosperity is affected by state of the local environment. Small businesses are also victims of environmental crime. A recent FSB survey reveals that 13% of businesses have suffered graffiti. Anecdotal evidence suggests that many are also victims of fly-tipping.

1.3 For these reasons the FSB is keen to see:

(i) small business awareness of environmental legislation raised and
(ii) successful investigations and prosecutions to deter environmental crime.

It is anticipated that this will help to ensure that there is a level playing field on which all businesses can compete.

2. AWARENESS OF ENVIRONMENTAL LEGISLATION

2.1 There is an increasing quantity of increasingly complex environmental legislation. The impacts of legislation and the requirements that new legislation places on individual businesses can be difficult to unravel. This is particularly true for small businesses that rarely have any staff member with dedicated responsibility for environmental issues or compliance. For the majority of businesses environmental issues are not a core priority and there is low awareness of environmental legislation that is relevant. For example, both the FSB and the Environment Agency have conducted studies that highlight that only 23% and 24% respectively of businesses are aware of Duty of Care. Due to small firms' reliance on local authority waste contractors, we do not anticipate that non-compliance with Duty of Care is as high as this statistic might suggest. Nonetheless it highlights the low degree of awareness of even long standing and basic environmental legislation.

2.2 The FSB therefore considers that this low level of awareness means that for the most part small businesses that may breach environmental legislation do so inadvertently rather than with the intention to circumvent the law for commercial gain. Given the documented low level of awareness of environmental legislation, the FSB considers that insufficient importance has been placed on rectifying this.

3. IMPLEMENTATION AND REGULATION OF ENVIRONMENTAL LEGISLATION

3.1 In many instances the practicalities of implementing environmental legislation and the knock-on effects for other pieces of environmental legislation do not appear to be considered. For example, the classification of some electrical equipment as hazardous wastes further complicates the implementation of the Waste Electrical and Electronic Equipment Directive.

3.2 It is the perception of small businesses that there is inconsistency in regulators application of environmental legislation.

4. ENVIRONMENTAL REGULATION AND PENALISING ENVIRONMENTAL CRIME

4.1 The focus of the environment agencies is to regulate activities according to the law, funded through grant-in-aid and fees and charges. It is therefore at a disadvantage in its efforts to resource activities intended to tackle illegal activity, since grant-in-aid is reducing and it is inappropriate to use fees and charges to tackle illegal activity.

4.2 The FSB considers that the agencies have, for the most part, sufficient investigatory and prosecution powers however; obtaining sufficient evidence to achieve a successful prosecution can be difficult and requires resources that are not necessarily available.

1 FSB “Lifting the Barriers to Growth in UK Small Businesses 2004”.
2 ibid.
3 Lifting the Barriers to Growth in UK Small Businesses 2002, Federation of Small Businesses.
4.3 In general the penalties for environmental offences, particularly where these are organised environmental crimes are insufficient to act as a deterrent. In its responses to the Fly-tipping Strategy and the Clean Neighbourhoods consultations the FSB has been supportive of increased penalties, where these are used to act as a deterrent. In order for penalties to work the business community must be aware of them and those involved in organised crime must consider the risk of apprehension and successful prosecution and serious penalty to be high, otherwise they will continue to take calculated risks to the detriment of the environment and local communities. In addition, the FSB sees value in linking penalties to the assets or net worth of the business.

4.4 Whilst improving the competency of magistrates dealing with environmental crime has been an area of work, this remains low and results in a limited appreciation of the seriousness and wider impacts of environmental crime.

4.5 The FSB has also been supportive of the use of a wider toolkit of penalties for environmental crime. However, the use of alternatives must be in conjunction with a wider appreciation of the impacts of environmental crime, greater resources for investigation, and an appreciation of the differences between accidental and purposeful and knowing breaches of environmental law. These alternatives must also be publicised in order that they might act as a deterrent.

5. Educating the Small Business Sector

5.1 There is significant scope for improvement in the communication of environmental obligations to business. SMEs need information and assistance on regulation affecting their business, particularly with regard to environmental regulation. In recent FSB research\(^5\), 41% of respondents stated that clear information about government requirements would encourage environmental compliance and improve businesses’ environmental performance. There is clearly a demand for more information on this topic.

5.2 Through the NetRegs project, the environment agencies website aimed at providing free, anonymous information about environmental legislation and compliance to small firms, the environment agencies have gone a long way toward improving their reputation amongst the small business sector as more than an enforcer. The FSB has actively worked with and promoted NetRegs, considering it to be a very useful tool for small business. We would like to see its existence promoted more actively to encourage greater use by small firms.

5.3 In addition, the FSB has strong links with envirowise and is supportive of this government programme. We consider that a future focus of the initiative should be to further promote the best practise and advice it has available and to actively seek out firms not yet considering environmental issues as central to their business operation. Increased promotion of this and other similar programmes and the business opportunities arising out of good environmental practise and credentials is vital ensure get small businesses actively engaged in this agenda.

October 2004

Witness: Mr John Holbrow, Environment Committee Chairman, Federation of Small Businesses, examined.

Chairman: Thank you for coming, and thank you for your memorandum, which we read with interest.

Q159 Gregory Barker: You have 185,000 members, which is very impressive. You divided them up into small and micro. What is the split?

Mr Holbrow: We would consider a micro those that employ 10 people or less.

Q160 Gregory Barker: How many of your firms are micro, as you define it?

Mr Holbrow: The majority. I do not have the exact figure, but I can get that for you. We made our own members aware from our own in-house magazine, but there was very little in the press to raise awareness.

Q161 Gregory Barker: The majority are micro.

Mr Holbrow: Yes.

Q162 Gregory Barker: That would be helpful. According to the evidence provided by the Environment Agency, SMEs are responsible for over 50% of pollution incidents, and more than 60% of the commercial/industrial waste produced in England and Wales. That is not a very good record, is it?

Mr Holbrow: I would say that although we do not condone breaking the law on these matters, a lot of it results from ignorance. It is no defence, and we would like to see the Environment Agency and the Government generally making people more aware of the environmental laws. We had an instance recently where the Hazardous Waste Regulations came out in July, and if one read the press there was very little information. We made our own members aware from our own in-house magazine, but there was very little in the press to raise awareness.

Q163 Gregory Barker: Of this huge number of pollution incidents committed by your members, how many of them do you estimate were committed by firms in the construction area?

---

\(^5\) FSB Lifting the Barriers to Growth in UK Small Businesses 2004.
Mr Holbrow: We do not have the evidence of that, but the impression we have is that some small building companies do cause problems with fly-tipping—

Q164 Chairman: You do not have to go far to discover that.
Mr Holbrow: No indeed. We do not condone it, and we would like to think the information we hand to our members—well, they are not all our members.

Q165 Gregory Barker: You say you do not condone it. That is not a very strong statement. It is an illegal act to fly-tip. Are you stronger than that?
Mr Holbrow: Yes. In our in-house magazine we produce articles pointing out that it is illegal and that people should not do it, but we have so many members, and with lots of people in the construction industry, all one can do is make them aware of it and hope that education over time will point out the error of their ways.

Q166 Gregory Barker: What sort of impact will the end of co-disposal have? Are they aware of it?
Mr Holbrow: If they read our in-house magazine, they are aware of it. Co-disposal will be a problem, and it is not being helped by the fact that there are very few waste sites around the country that can deal with such things.

Q167 Gregory Barker: Do your members read your in-house magazine?
Mr Holbrow: They do. I believe, from some of the questions we get; but whether they act on it, who knows! I would hope they do.

Q168 Gregory Barker: How many members have you found to be operating illegally when it comes to disposal of waste—do you know?
Mr Holbrow: I do not have an answer to that. We will search our records and see if there is something that we can send on to you.

Q169 Chairman: The Environment Agency have told us that in their opinion—and this is fairly depressing—about 70–75% of small businesses are completely unaware of their environmental obligations. That figure would suggest that not a lot of people are reading your in-house magazine.
Mr Holbrow: We do not disagree with that figure. The Environment Agency did that survey via their NetRegs and we did a similar survey in our Lifting the Barriers earlier this year. The Environment Agency figure was 24% and ours was 23%. All we can do is re-double our efforts to make people aware. I agree it is depressing, but if you look at all the regulations that SMEs have to deal with on employment and lots of other things, sad to say that environmental legislation is not the top of their list. They do not have big HR departments et cetera and the owner is usually the HR manager as well. Although, as I say, we do not condone it, all we can do is provide the information. We cannot go out and make sure they do it.

Q170 Chairman: Would it be higher on the list if the fines were greater?
Mr Holbrow: I think that is the case. Again, one needs to target fines. From some of the evidence we have had, not all cases are prosecuted, and there is a very patchy regime throughout the country from the Environment Agency. What happens in some cases would not occur in another part of the country, and we would like to see a more uniform approach throughout the country so that we do have a more level playing-field. We get members in one part of the country that will get prosecuted for doing the very same thing that occurs in another part of the country, and nothing happens. Again, we do not condone bad behaviour.

Q171 Gregory Barker: Of your members, there are an awful lot of small and micro businesses. What percentage of the overall sector do you represent?
Mr Holbrow: Again, I do not have that figure, but we can get it for you.

Q172 Chairman: That would be helpful as well. Going back to that exchange, and the fact that you say you do not condone illegal activity and you try to inform your members of what they need to do, the feeling I am getting is that there is more than a little tipping of the wink—“mind your eye because you could get caught doing something naughty”; rather than taking the lead in saying, “this is clearly something that is unacceptable and you should not do it”.
Mr Holbrow: We do that in our articles because we do point them to what I believe is one of the best sources of information for small businesses, the Environment Agency’s own NetRegs. We give the website and the details of how to contact NetRegs in these article, which is very important. Where something is provided that is good, I still think government should give more publicity in good time. They know when a lot of these regulations are coming in because they often start of in Brussels, so there is good time to let people know; but it does not always happen.

Q173 Chairman: The Environmental Services Association has a code of conduct for its members that involves penalties and possible expulsion if they persistently break the law. Do you have a code of conduct?
Mr Holbrow: We have a code of conduct that members should operate in a particular way. We do not have penalties. We do not think it is appropriate for our organisation to have those sorts of penalties.

Q174 Chairman: Why should it be appropriate in the Environmental Services Association?
Mr Holbrow: I do not know. I am not familiar with the way they operate, but certainly we do not think it is appropriate for our members.
Q175 Chairman: Is it not bad for your reputation as an organisation that there may be members who are repeatedly flouting the law, and who remain members of a respectable organisation like the Federation of Small Businesses?
Mr Holbrow: If it came to our attention that was happening, we would certainly look at it when membership renewal came up. However, it has not been brought to our attention that people are doing that. If it was, we would certainly look into it.

Q176 Chairman: Are you aware of how many, if any, members of your organisation get prosecuted every year for environmental offences?
Mr Holbrow: No.

Q177 Chairman: Do you think you should be?
Mr Holbrow: I do not think it is our duty to take one particular aspect of regulation, namely environmental legislation, and home in on that. We do of course have a 24-hour legal helpline, so that if there are people who are unsure they can ring that helpline to make sure they do not break the law. We have invested significant sums of money in giving them access to this legal helpline.

Q178 Chairman: Are you able to provide assistance to your members if they get into legal difficulties, and give them legal advice after the event?
Mr Holbrow: Yes, we do have a facility via the legal helpline to assist them, providing they make people aware early on in the piece. We do not come round to sweep up the mess afterwards. If they let us know they have a problem, then we will provide legal advice and legal help.

Q179 Chairman: What sort of cases do you get? We are obviously interested in environmental crime and fly-tipping and that kind of activity, which seems to be very prevalent, and I am afraid is associated in the minds of many with smaller companies.
Mr Holbrow: Indeed.

Q180 Chairman: How many cases of that type come up through the legal helpline.
Mr Holbrow: We do have statistics, but I do not have them to hand. We will look at that and let you have them.

Q181 Mr Challen: Do you get any direct help from the Environment Agency to communicate with your members about environmental offences at all?
Mr Holbrow: Not direct financial help, but we do have speakers along at some of our branch meetings and regional meetings. The Environment Agency are very good in providing speakers at meetings when we request them.

Q182 Mr Challen: I am intrigued as to how you see your role, whether it is a proactive role in helping to educate members not to commit environmental crimes or whether to defend them, to provide a legal advice line and help them, as it were, to get off the hook.
Mr Holbrow: Not the second one of those. We spend an awful lot of our members' money in raising awareness and providing legal information. We believe the information is there, and we provide details of how they may access that information. What we cannot do is to force them to do it.

Q183 Mr Challen: Do you think the Environment Agency should be doing more with you to promote understanding of environmental crime, and if so what sort of things should they be doing? Have you been to them and said, “we think you should be doing this or that to help us”?
Mr Holbrow: We do have regular meetings with the Environment Agency, as to what services they can provide for small businesses. As I said before, the NetRegs one is a very good system, and we were involved in detailed discussion with the Environment Agency when NetRegs was set up, as to what small businesses needed from it. We think that that is a very good system. However, we feel that what needs to be done earlier in the day, when new legislation is coming in, is to give small businesses the information.

Q184 Mr Challen: How often do you meet with the Environment Agency? Do you have regular meetings?
Mr Holbrow: Yes. We have a slight difficulty at the moment in that our policy development officer who attends these meetings has recently left the Federation, and until we get a replacement early in the new year, there may be a small period of time where the meetings are not so regular. We welcome these meetings with the Environment Agency to exchange views.

Q185 Mr Challen: Just to exchange views though, not to talk about how you can practically get to grips with this problem.
Mr Holbrow: Yes. We do talk about what they plan to do, and we ask them to do things that we would like to see in terms of raising awareness. I keep coming back to that, because it is the raising of awareness by all parties that is important. Unless they are aware, they will break the law often without realising it. It is this whole question of raising awareness that is the real key, where the Environment Agency, Government departments, the Small Business Service and all agencies, including ourselves, can help raise awareness.

Q186 Mr Challen: We have already discussed that there are some kinds of business that probably have a greater propensity to cause environmental damage, and it may well be that they are less likely therefore to be members of your organisation. I think that is probably true because they are not very responsible to start off with. Do you try and communicate with particular sectors, or is it simply through your magazine and your website?
Mr Holbrow: It is still our magazine but we do look at particular sectors when particular legislation comes out—for instance, we responded to the White Paper on fly-tipping and talked to a number of our
members in the building industry. I liaised with the chairman of our construction policy committee on this whole question of fly-tipping. Again, we get anecdotal evidence that it has been dealt with properly, but other anecdotal evidence came out to say it has not been dealt with by small businesses properly. We like to think that people who have taken the responsibility of joining an organisation like ours are not in the forefront of fly-tippers.

Q187 Mr Challen: Do you monitor the use of your legal advice line or the other help that you provide legally, to see what kind of offences have been committed, and to see if there is a pattern?

Mr Holbrow: We monitor regularly the queries that are referred and the telephone calls that are made. As I said earlier, I can provide you with that information. We do not monitor prosecutions unless they come through our legal advice line service.

Q188 Chairman: You are chairman of the environment committee, are you not?

Mr Holbrow: Indeed.

Q189 Chairman: How often does the Committee meet?

Mr Holbrow: We meet as and when required. We meet two or three times a year to look at overall policy, but we meet on a regular basis on particular legislation.

Q190 Chairman: So you have \textit{ad hoc} meetings as well as regular meetings.

Mr Holbrow: We have \textit{ad hoc} meetings. We have focus groups and take ourselves away for a whole day. We get people who are involved with particular pieces of legislation. We have done that recently with environmental liability, which has just come to Westminster having come out of Brussels. We are also at the moment doing the detail on the REACH regulations, which are still in Brussels, but we need a small business voice raised on that. We would have specific companies that have the problem along for a focus group, take all day over it and then come up with information which we will then use for lobbying our point of view.

Q191 Chairman: Do you think there are too many environmental regulations?

Mr Holbrow: I think they need to be more focused. They are scattered a bit like confetti. It would be better, I feel, for the environment, if they were more focused. To give you an example, I would maintain that the Climate Change Levy is a tax-raising levy rather than having a (marginal) effect on the environment. I have yet to meet anybody who has done a great deal when faced with the Climate Change Levy, which is involved with making environmental change. They may change their supply to reduce their costs—talking about small businesses—to actually make a significant change. Therefore, I think the environmental legislation needs to be focused on making a benefit to the environment. I think our members would go along with that more, rather than just seeing it as a tax. One can add aggregates tax in that as well.

Q192 Mr Francois: There is a lot of scepticism about the Climate Change Levy, as you quite rightly say, as to whether it has environmental benefits or whether it is a tax. There is an additional issue, is there not, that in some cases smaller companies are unable to qualify for the 80% abatement that larger companies can then negotiate on.

Mr Holbrow: Yes, indeed.

Q193 Mr Francois: That is my impression, but since you are here is that correct?

Mr Holbrow: Yes, that is correct. We do have some members. One comes to mind: I was speaking the other day to a baker who is a member of the FSB but also a member of the Federation of Master Bakers. They have a negotiated agreement, so although he is a small company he can get his 80% reduction from the negotiated agreement on the basis of the big users. We do have other businesses around, but the majority of small businesses cannot enter into negotiated agreements because they do not have the number of big companies in the same sectors. This is the problem.

Q194 Mr Francois: You said it yourself, so we cannot be accused of putting words in your mouth. The general view is that basically it is just a tax. The general view is that basically it is just a tax.

Mr Holbrow: Yes, and this is not just an opinion. We have done a survey a year after the Climate Change Levy came out of small businesses, to see what their attitude was and which sectors were affected, because some are affected more than others—hotels and restaurants are affected, where they have small numbers of people but they do not get the rebate of the payments and they do have very high costs. They were quite adamant in the survey that they see it as another tax. If you want to join in the game, then that is a tax you have to pay. The only way they see of mitigating it is to negotiate with the energy suppliers to see if they can get on to a lower tariff. Combined heat and power plants, which also give you an advantage under the Climate Change Levy, are not appropriate for small businesses. In the area I come from, the local council does a lot of work on providing combined heat and power plants, but that is used to go to very large businesses, because you would not invest in a combined heat and power plant just for a small business—it is not economic.

Q195 Mr Francois: I do not want to get too bogged down, but would it be the view of the FSB that you would like to see the levy markedly amended or scrapped?

Mr Holbrow: Scrapped preferably or amended if possible.

Q196 Mr Francois: With regard to this whole matter of regulations and fines, we have had submissions from other parties that there is a general feeling that some regulations are just too complex and unworkable, and that they almost have a perverse
incentive of encouraging some companies to break the law because the whole thing is such a mess. What is your view of the overall state of regulation? Can you give us some idea?

Mr Holbrow: I think regulations need to be looked at more carefully. There is scope for de minimis levels to help small businesses, or in Brussels derogations of small businesses; but ministers and the Commission seem to set their minds against it because they can point to a few instances where a small business does do an awful lot of damage. There is scope for change in the whole area to help small businesses. As I say, it is not just the environmental businesses that are the problem; it is that added onto other regulations.

Q197 Mr Francois: Do you think the current levels of fines are effective deterrents to those who get caught?

Mr Holbrow: No. Again, while not condoning significant increases in fines, it is not looked up on as being a deterrent. Some of our members even report that they see blatant things going on; they report it, but nothing appears to happen. It is not saying nothing does happen, but nothing appears to happen, which is one of the complaints I hear going round the country. All the regulations are there, but if people break them, the level of fines is not seen as a deterrent.

Q198 Chairman: Yet you said you would not condone a significant increase in fines.

Mr Holbrow: No, because it is an increase to business costs.

Q199 Chairman: It is an increase in business costs for businesses that do not behave properly, but what would you recommend instead?

Mr Holbrow: I think one has to increase awareness. It is this whole question of increasing awareness of the regulation and a light touch from the Environment Agency to point out the error of people's ways, rather than necessarily coming down with heavy fines.

Q200 Mr Francois: What is the point of having increasing awareness if when they do transgress the fines are so de minimis that it makes no difference?

Mr Holbrow: Again, it is a bit like some of the answers of our water company colleagues; it is this public perception in the areas in which small businesses work. They are working in the community; it is their community, and therefore they would not want to be seen—certainly our members would not want to be seen upsetting colleagues and other people who may very well be customers in their own area.

Q201 Mr Francois: You are almost arguing, without putting words into your mouth, that the fines do not really work and it is better to try and shame them.

Mr Holbrow: I would have thought so.

Q202 Chairman: There are people we know who deliberately flout the law for profit. They do it for gain because they make money out of it, and they undercut their competitors, and they are unscrupulous; and they know the law backwards. That is how they are able to circumvent it. I do not suppose that in cases like that you are saying we need to keep fines down.

Mr Holbrow: I think though the Environment Agency will know who those companies are, and those companies really do need stricter fines.

Q203 Chairman: Substantially bigger fines.

Mr Holbrow: So that it is a deterrent.

Q204 Mr Francois: The Chairman is right; those people that do cheat blatantly—others will say, "why on earth should we abide by the law when the company down the road gets away with it?"

Mr Holbrow: Yes.

Q205 Mr Francois: Are you saying that for those persistent offenders, they really should get clobbered?

Mr Holbrow: Yes. There is also a need—and again this is a personal view, not necessarily FSB policy—for local magistrates to have better training, because some of this law is very complex. Therefore I am not convinced, from cases I have been involved with in the past, that magistrates understand the complexities of some of these laws.

Chairman: We have received a lot of evidence to that effect and published a report earlier in the year on it.

Q206 Mr Francois: On a related point, the Environment Agency, when previously appearing before this Committee, complained to us that quite often they want to be proactive, but they really do not think they have the resources to police this legislation properly. Is it your experience that the EA is under-resourced?

Mr Holbrow: Yes. There are all sorts of areas where the Environment Agency needs more resources. I think they are doing a reasonable job with the resources they have got. I come back to this point, that the EA website is superb. It provides small businesses with a lot of extremely good information, and we do continue a dialogue with the Agency as to how that may be updated with more information. Again, there needs to be an incentive for people to access that site.

Q207 Mr Francois: You talked about clobbering those that really transgress; the Environment Agency are particularly interested in using the lifestyle provisions in the Proceeds of Crime Act 2003 as one mechanism for doing what it is you are arguing for. Are you aware of that, and what effect do you think it would have on companies if it were used in the way the Environment Agency would like?

Mr Holbrow: I am aware of it. It would be welcomed by the honest trader who, particularly in the construction industry, is doing his best to meet all
this complex environmental legislation; and if he saw people deliberately flouting the laws for profit, then that has to be welcomed. Small businesses would welcome that because it would make a more level playing-field, and their costs would not mean they were at a disadvantage to the people that are doing this illegal activity.

Q208 Mr Francois: So those who abide by the law would no longer be at a disadvantage.

Mr Holbrow: Exactly.

Q209 Chairman: That concludes our inquiries. Thank you very much indeed.

Mr Holbrow: Thank you for the opportunity for putting our point of view.

Supplementary memorandum from the Federation of Small Businesses (FSB)

At last week’s inquiry into environmental crime where you took oral evidence from John Holbrow, FSB Environment Affairs Chairman, we promised to give the Committee further evidence on the FSB and its members. We hope the information below helps the Committee in preparing its report.

1. Breakdown by number of employees of FSB membership (FSB 2004 membership survey):
   - 0 employees . . . 9.5%
   - 1 employee . . . 12.3%
   - 2–4 employees . . . 33.3%
   - 5–9 employees . . . 23.8%
   - 10–49 employees . . . 19.2%
   - 50–99 employees . . . 1.3%
   - 100+ employees . . . 0.6%

In total the FSB’s members employ 1.25 million workers.

2. FSB membership as percentage of total UK SMEs:
   - Total FSB membership = 185,000
   - Total UK SMEs = 4 million (Source: latest National Statistics Office figures)
   - FSB membership as percentage of total UK SMEs = 4.625%

FSB nevertheless remains the largest business organisation in the UK.

3. Breakdown of FSB legal advice line calls on environmental regulations:
   - Average number of calls to advice line per month . . . 11,000
   - Average number of calls on environmental regulations per month . . . 420

November 2004
Thursday 11 November 2004

Members present:

Mr Peter Ainsworth, in the chair
Mr Colin Challen
Sue Doughty
Paul Flynn

Witnesses: Mr Richard Holman, Company Secretary and Director, Ministry of Sound, and Mr Gary Smart, Manager of The Ministry of Sound Club, examined.

Q210 Chairman: Good morning to you both. Thank you very much for coming along. I appreciate that it is probably a rather unfamiliar venue for you, although you may find that the portcullis strikes something of a chord. This is our final evidence session in an inquiry into corporate environmental crime. You may wonder why you are here. The principal reason is that we are looking, amongst other things, at fly-posting. All of us have seen from time to time Ministry of Sound posters up in places where they probably should not have been, although I have noticed, purely anecdotally, that in the last couple of weeks most of the posters where I normally see them have not been there. I do not know whether that is in any way related to your visit here this morning.

Mr Holman: No. It is related to other pressures coming to the surface.

Q211 Chairman: Can we just explore the nature of fly-posting and the type of business that you are in? What are the main ways that you communicate with potential customers?

Mr Holman: Can I first of all make the point that there are two separate sides to our business, one, the record side, where people like Sony and BMG have been in the frame. We stopped fly-posting for record sales almost entirely some time ago, so we have been using this method of marketing essentially for events. I will ask Gary Smart, who is our club manager, to answer your questions on that side of the business.

Mr Smart: Fly-posting is part of the whole network of club promoting. Clubs and sales have got their own sub-culture, their own followers. They know where to see an advert; they know what they are looking for; they know what catches their eye. To promote a club night or an event there are only so many things you can do. You can place adverts in magazines, which are somewhat non-specific and a bit hit and miss. You can walk round all the cool shops and the clothes shops and leave bundles of flyers, leaflets, which is allowed, and you can randomly leaflet hand-to-hand in shopping centres in busy areas and club exits. Another key part, which has always been a key part, is fly-posting, whether it be legal or illegal, in places where people stop at traffic lights or will be in queues and will be able to sit there and read them and hopefully what they see appeals to them. New things are coming now—text messaging; you can do an e-flyer, and we do all of these things as well. It is a very important part of getting a very sharp message over very quickly to potential customers.

Q212 Chairman: Do you think fly-posting ought to be legalised?

Mr Smart: I think it could be legalised or it could be done in a way where there are allocated sites. From our point of view we would like that. We are probably an organisation that could afford to do that. Whether it would stop random individuals doing their one-off parties and putting up posters where and as they see fit, probably not. They would still go about doing that, which is probably the part that makes the place look so untidy. There is a conscientious way of doing it but there are people that really do not care who will just do it anyway.

Q213 Chairman: How is it possible to be a conscientious fly-poster?

Mr Smart: You have got in there reports where people are sticking things on phone boxes, letter boxes. That is wrong. People should know that. Then there are things like the hoardings round building sites which are temporary and if the posters are in a row they look neat and it does not look that bad in my opinion. Whether it be legal or illegal, in places where people stop at traffic lights or will be in queues and will be able to sit there and read them and hopefully what they see appeals to them. New things are coming now—text messaging; you can do an e-flyer, and we do all of these things as well. It is a very important part of getting a very sharp message over very quickly to potential customers.

Q214 Chairman: What about those telecoms boxes that you see on the pavements?

Mr Smart: That looks terrible. It is wrong. It is someone else's property. Old shop fronts—it is wrong. There are certain sites which we have been led to believe by the people that do the fly-posting, framed sites, which I guess used to be owned by the big advertising companies, are legal sites. They have apparently bought these boards and have 10 posters in a row. It does not look horrific and it serves a purpose for the events and the club culture that is out there.

Q215 Chairman: Can we just come back to something that Mr Holman said, which was that you stopped using fly-posting for the records almost completely. Can you explain the “almost” bit and also why you took that decision?

Mr Holman: The “almost” bit is because there may still be—I do not think we have done it recently—one or two low-level releases, CD music releases, that are linked to clubbing type events, so they are aimed at the same market as Mr Smart has talked about in relation to club events. Most of our sales
now are aimed at the general public, 95% of whom probably would not come to the club at all, and so we use mainstream television advertising to get the message over there because that is the most effective. The reason that we are still using fly-posting in relation to club events is simply because of its efficiency. It reaches the market that we are trying to reach—lots of students, lots of young people. I am sure they do watch television some of the time but they probably do not take note of the adverts and probably do not read newspapers very much. They probably do not plan their lives very far ahead, so fly-posting that they see two or three days before an event is going to be more effective. It has just been the way that club events have been marketed, certainly in our case, for nearly 15 years.

Q216 Chairman: But you have stopped doing it in relation to the majority of your record releases for marketing reasons or because of the high profile prosecutions of fly-posting?

Mr Holman: Not because of pressure from local authorities, but because it was not the most effective way of getting the message across to the public that we were aiming at.

Q217 Chairman: Do you arrange for the fly-posting yourselves or do you have an agency that undertakes that for you?

Mr Smart: Usually individual promoters. We have our own in-house nights, and obviously if there is a private hire, if someone has hired the club on a Thursday night or a Sunday night for any type of event, they then advertise that event as they see fit.

Q218 Chairman: You let them use your logo, do you?

Mr Smart: They usually use the logo, yes. I think everyone is aware that it is illegal and even in our contract to private hirers it states quite clearly that they should not do it, and it is something they will do.

Q219 Mr Challen: I noticed in parts of the Chairman’s statement, for example, that brand licensing had become an important component of your business. In the licence conditions you have just referred to, a contractual arrangement where they are told not to fly-post, or rather, they are told it is illegal, which is not quite the same as saying not to do it, do you have a licence condition that says they should not do it and, if you do have that condition, do you enforce it?

Mr Holman: Most of the licensing we do is on the products, hi-fi equipment and so on in Argos and places like that, so this is a fairly small sub-set of the use of the brand. As Mr Smart has said, we will try to prevent people but many of the users of the club are people who take private hires with us, and it may only be one event so it is a bit late to reprimand them afterwards because it has already happened. We probably could take a stronger line and put a double line under that bit of the agreement but it is very difficult to police.

Q220 Mr Challen: How many one-off events are there? I do not quite understand the business, you appreciate.

Mr Smart: There could be one a week, 52 a year. There are more on some weeks, two or three a week sometimes.

Q221 Mr Challen: But if you found that somebody had broken that licence you would not accept them again as a promoter? Would that be the case?

Mr Smart: We are quite happy to pass on the details if we receive a letter saying the posters have been seen for the event and it is not our event. We would be quite happy to pass on the details of the person putting them up and they obviously have to react the same way we would when we received that notice. No, we would not stop them from hiring the club.

Q222 Chairman: Is fly-posting a reaction to the cost of legitimate advertising? It costs a lot of money, I imagine.

Mr Smart: It is not really. We do a lot of legitimate advertising. We are one of the most prolific clubs in the world but we advertise everywhere we want to advertise. Fly-posting is just a very important added extra.

Q223 Chairman: Do you know how important? Have you done any market research on who comes and for what reason; how they learned about the event?

Mr Smart: No, we have not.

Q224 Chairman: You just know?

Mr Smart: You talk within the industry and people say, “I saw your poster”, “I saw your flyer”, “I picked up on your flyers”, whatever. If there is a big event and you have got some activity going on outside it to promote another event that you have got going on, it has got to be as direct marketing as possible.

Mr Holman: Fly-posting is only part of the marketing we use. We use e-mails, we use text messages, we use entries in What’s On-type magazines. It is part of an armoury. It is not the way we spend all the money and therefore we are not running on a virtually zero marketing budget by using fly-posting.

Q225 Chairman: What do you say to the people who feel that fly-posting contributes to environmental degradation in an area? It looks tatty and creates an atmosphere that is tending towards being a bit squalid and therefore tending to encourage rather more serious forms of crime: do you buy that at all?

Mr Holman: Yes, we do. Generally we try to meet our obligations. For instance, we have bought our own street cleaning machines and after club nights we go round and make sure that the streets are probably cleaner after the nights when we have had 2,000 people coming out of the club than they were before, with no disrespect to Southwark Council. They do keep the streets very clean. That is an
Ev 50

Environmental Audit Committee: Evidence

11 November 2004  Mr Richard Holman and Mr Gary Smart

Illustration of the way we take our responsibilities. Certainly if we felt that anybody who was fly-posting for us had been behaving in an irresponsible manner, in a way that caused councils to react, we have always responded as rapidly as possible and taken the posters down when we have been told to. We have talked to the fly-posting people if they are clearly going into areas they should not have done. We have cut back on our activity in fly-posting because it has become a sensitive issue with the local authorities.

Q226 Chairman: Have you ever used the services of a company called Diabolical Liberties?
Mr Smart: No, we have not used them. As far as I am aware it is individual promoters who allocate these posters for companies. London is pretty much split into quarters. If we did a poster run on an event the posters would be split four ways, but one is not Diabolical Liberties, no.

Q227 Sue Doughty: I am quite interested in the impact on the business if you are fined. We had Thames and Anglian Water both in here, very different sorts of business, of course. They on the face of it claimed to have a good record on environmental crime but when they get fined it very much hits them in the long run because if somebody does a trawl of their businesses there is something on the record and that is a very big no, so in terms of viability of the business it has had a disproportionate impact because the fines themselves are fairly insignificant compared to their turnover. What do you think is the pressure on you to comply with regulations? Is there any pressure apart from the fact that somebody is going to do you for it? Are there any commercial pressures?
Mr Holman: They are not very great. We are not a public company. It is not that Ministry of Sound is not high profile but we do not have quite the sensitivity of large companies with shareholders and there are not any City pressure groups. Clearly, we do not like paying fines and we always try to avoid paying fines if we can. If we are given 48 hours to get the posters down we get them down. Clearly, if we were being hit on the bottom line and our profit was being seriously affected by draconian financial penalties we might react more rapidly, apart from banning the whole thing, which is presumably where we may end up.

Q228 Sue Doughty: Is this something to do also with the image of your organisation which has been very sparky and has the appearance of being slightly anarchic? That is your market place?
Mr Holman: Yes.

Q229 Sue Doughty: So that that market place would almost work directly against something which was very law-abiding, very respectable. That is not where you are in the business world, is it, being respectable?

Mr Holman: Precisely.
Mr Smart: In a way, although more recently pressure has been stepped up to stop this, we have discussed it with the people we use and have tried to be conscientious as to where the posters go up and we have been informed that the sites they are using now are okay to use. Having said that, we have not received any fines for quite some time. Beforehand it was very random. As you said, there were posters up. Coming under Waterloo Bridge, for example, both sides would be solid posters. Now it is clean, so it is obviously a site that they do not use any more, and we have not received any notices recently.

Q230 Sue Doughty: If we were to move towards dedicated advertising areas, and we touched on that earlier, which clubs could use for their posters, would this be an acceptable way forward? Do you think it could work? Would it take the posters off the places we do not want them and put them in other places? If you had your notice boards and young people could go to that place to find out what you were doing, could it work?
Mr Smart: In an ideal world it would. You sometimes see these formal sites, not the huge ones that the massive companies buy, but the formal sites in nice framed areas. They do not really work. For example, if the building companies would allow the hoardings to be used to create a framework then you could pay to go on those sites because they are good, visible sites, but if it was too formal it would just be an avenue of information that you would have to cease because it would not have the effect.
Mr Holman: I noticed in your report a reference to Leeds where they had drums and we would be interested to know whether that has worked or not. That sort of focused business area where those sorts of posters can be placed would seem to me to need to be very effective. People who come to our events want to know what is going on and we need to find the best channel for reaching them.

Q231 Chairman: Certainly Leeds City Council believe it has been very effective because the quid pro quo for putting up the drums allows people to stick their posters all over that but they are very hard on fly-posting elsewhere.
Mr Holman: It seems very logical.

Q232 Mr Challen: Do you have an environmental policy or a corporate social responsibility policy? These are now getting more and more evident in the world of commerce.
Mr Holman: We do not have a written policy, no. There are a number of policies that we are in the process of writing but not specifically those. We are trying to move more towards a full corporate governance regime but at this moment, no, we do not.

Q233 Mr Challen: Given that some of your activities, perhaps on a diminishing scale, do involve activities which are illegal, if you like, or at
least degrading to the environment, do you not think you ought to have such a policy clearly set out that people can look at and hold you to account on?

Mr Holman: That is probably correct. Writing policies is something that does not seem to add much to the business but this sort of issue and also the human resource issue means that we are having to write more policies. I still sometimes question whether a written policy achieves all that much without the full policing behind it.

Q234 Mr Challen: In that case do you have somebody with a specific duty within the company to monitor these areas?

Mr Holman: No, we do not at the moment. I cannot see us having somebody whose job it is to monitor adherence to any environmental policy. It would not be a full time job unless they had a motor scooter and rode round London looking for illegal fly-posting.

Q235 Mr Challen: It would be very hard for your company to assess the impact of fly-posting. Perhaps the only way that you would learn more about it would be when people complained, which is a very negative way of assessing its impact, is it not, or if you have to go to court?

Mr Smart: The attention and pressure that has come on is quite recent. I have been in the club for 22 years and fly-posting in every shape and form has always been part of what we do and no doubt what is done everywhere in the world for clubs. The pressure is only coming on now and obviously we are reacting to it. Our first thing was to try and ensure that the companies that do our fly-posting think about what they are doing and wherever we get a warning we make sure we do not do those areas, and the sites they use are in their opinion legal or they own the sites. If that is not the case then obviously that site goes. It is going to get to a stage, obviously, where we just cannot do it and alternatives, if there are any, need to be looked at. The pressure is very recent, is it not?

Q236 Mr Challen: It is, I guess. Would there be any value to the company to say, “We are the first in this field to go down this environmental route”? We have been told that a lot of young people are rather fond of environmental causes and whilst we have heard that promoting an anarchic image may have its benefits in one area perhaps this is something you ought to consider.

Mr Holman: We will take that up. I think life is moving in that direction and I will suggest that we look at that.

Q237 Mr Challen: The Environment Agency said they believed that some companies had set up funds specifically to pay the fines incurred brought about by companies’ environmental offences. Do you have such a fund?

Mr Holman: We do not. It would be tiny if we did because we have very few fines. As we have said, where we get notices that a poster is offensive we take it down. If the council is clearly concerned and is launching a broader attack then we will reduce or stop fly-posting in that area. They penalties we have paid might have been £500 in a year, if that.

Q238 Mr Challen: Do they act as a deterrent, these fines?

Mr Holman: In the sense that £500 matters, yes, but it is not material, but they do matter in the sense that we then try to avoid offending again. If we do get warnings from the councils we will stop fly-posting or find out what sites they have been on.

Q239 Mr Challen: Is it the approach in your experience of local authorities to come to you first to ask for posters to be removed rather than saying “We are going to take you to court”? Is there in that sense a co-operative approach from councils to try and remedy the problem, or do they prefer simply to issue a summons?

Mr Smart: They try and remedy the problem, definitely, and we are supporting that. They are not taking a particularly aggressive approach. It is just a fine.

Mr Holman: Normally it is a stern letter—48 hours or there will be a bigger penalty or court action.

Q240 Mr Challen: I can speak from my own experience of putting up posters during election periods and by-elections are notorious for the amount of posters that go up, but in our case they all have by law to bear an imprint. That could act as a deterrent to people who want to put up posters without saying on whose behalf it is published. It is difficult to conceal on whose behalf your posters will be published but the printer’s name has to be on it and the publisher’s name has to be on it. Is that something that you think ought to be more widely employed, the idea of putting that information on the bottom of the poster that people can see exactly who is responsible for each stage of that poster’s production and distribution?

Mr Holman: If there was a penalty regime that was being implemented quite strongly it would be a bigger incentive not to fly-post. As Mr Smart has said, in our case, and no doubt in other such cases, we are used as a venue by other people and it comes back to the point you were making about allowance of the use of our brand and our logo in the area that you are talking about.

Q241 Mr Challen: I do not know if you are familiar with the lifestyle provisions in the Proceeds of Crime Act which means that assets of directors of companies, for example, could be seized as well as fines being levied. Do you favour that kind of approach? Do you agree with me that more of a deterrent would be available there? Would you agree that that is an appropriate deterrent for addressing the problem?

Mr Holman: As a director of the company I would have to say it is rather a heavy reaction and would only be appropriate in cases of a continuous failure
to observe a more measured response. I see it as a fairly extreme penalty that might be necessary to back up anything else.

Q242 Chairman: Is not one of the problems that, in your business with your brand, getting into trouble with the law is quite a positive thing?
Mr Smart: No.

Q243 Chairman: Is it not quite cool to be bad?
Mr Holman: No, I do not think that is the image at all. That is certainly not why we fly-post. There may be a slightly fine line between being seen to be slightly underground and cutting edge, but—

Q244 Chairman: You have a subsidiary called Decadence.
Mr Holman: Decadance.

Q245 Chairman: Oh, I beg your pardon.
Mr Holman: It is not a brand name that we use much. It was somebody’s bright idea of a name for a company. No, it is certainly not breaking the law. As a club we have always been very strong in the drugs area, which has been one of the biggest concerns in clubbing, and we helped the Home Office write the new rules for that. It is not part of the Ministry’s brief to try to be seen to be sneaky law-breakers.

Q246 Paul Flynn: Mr Smart, do you think that the Ministry of Sound fly-posters enhance the beauty of the urban landscape?
Mr Smart: Probably not, no.

Q247 Paul Flynn: You seem to be suggesting that you are a tasteful law-breaker in that you only allow your fly-posters to go up in a nice orderly way and they are of high aesthetic quality. That is not what you are saying?
Mr Smart: I am saying they are in as much as hundreds of banks on the high street are or car showrooms are. They are part of the fabric of society. If they are up and they are not on stupid locations then they add something to society.

Q248 Paul Flynn: You are a cheerful, happy law-breaker, you have just told us. You are happy to be a law-breaker?
Mr Smart: No. I am under the impression that where we are putting them is allowable by the fact that we are not going to be pulled up or fined.

Q249 Paul Flynn: That is not true. You have been fined under the byelaw—
Mr Smart: Recently?

Q250 Paul Flynn: Yes, recently.
Mr Smart: We have reacted to those situations.

Q251 Paul Flynn: When you were called by Westminster Council to see them to try and ameliorate your behaviour, which people do with law-breakers rather than taking them to court, you failed to attend the meeting.

Mr Smart: Who, me?

Q252 Paul Flynn: Your organisation did. Ministry of Sound failed to attend when they were called by Westminster Council on 9 December 2002. You were subsequently fined with costs of £352.
Mr Smart: I am sorry; I was not aware that we were supposed to attend any meeting. We have always supported the police and the council in things like this if we are asked.

Q253 Paul Flynn: But you cheerfully break the law. Mr Holman, I find it fascinating listening to your evidence. I do not want to be unpleasant to you but it is refreshing to hear what Edward Heath described as “the unacceptable face of capitalism”. You describe your customers and their lifestyles in sub-moronic terms, you have clear disdain for your own customers and you make it clear that you will happily go on breaking the law and littering the urban landscape as long as it does not hit you in your most erogenous zone, which is your wallet, and nothing else seems to matter. It is all about your profit. If the fines are not big enough you continue to do exactly what you want to do. Is that a fair description of what you said just now?
Mr Holman: No, I do not think it is at all.

Q254 Paul Flynn: What about on the point that you say you have no environmental policy?
Mr Holman: I did not say that.

Q255 Paul Flynn: The environment does not matter at all? It does not appear on your landscape at all?
Mr Holman: I do not think that was what I was saying. I said we do have an environmental policy. We do not have a written environmental policy but we are very clear that—

Q256 Paul Flynn: It is a gleam in someone’s eye, is it, the environmental policy? You say that no-one is employed doing it.
Mr Holman: I have already said that in terms of cleaning up the area round the club, which is one of the most sensitive points of London so the council will be concerned about it, we have made big efforts to ensure that that is dealt with. We have been doing that for some years.

Q257 Paul Flynn: I am another member of this committee who has seen your posters or only knows about you because of your posters. They have suddenly disappeared very recently. The result when they disappeared was not that there was nothing left. The walls that were decorated with these are still a mess. Although it will clear away in time there will still be remnants of them and the place will still look like a slum. What is your view on that? We cannot identify that your posters used to be there. Many of us have passed them on a daily basis coming in to Westminster. Are you happy about that? Your clean-up is just to eliminate your name so you are not blamed for it.
Mr Smart: The areas where we are pulled up we do not advertise again and the areas where we want to continue and will continue until such time as we cannot are the areas that we are led to believe are sites that are owned by the poster companies.

Q258 Paul Flynn: But the only thing that is going to get across to you or has got across to you is this recent bad publicity about fly-posting. You were not worried about breaking the law. Because it is not an indictable offence you cannot be got at and there it is. Eventually pressure from the public stating what you were doing has got through to you. The other thing that would get through to you would be if the law hit you in your pocket. That is the message that you are giving us with your evidence this morning, is it not?

Mr Holman: You used the term “happy law-breakers”.

Q259 Paul Flynn: You seem very cheerful to me. I do not see any sign of guilt about it.

Mr Holman: We have made it clear wherever we have perhaps not focused sufficiently on the full terms of the law but we have tried to a certain extent to work within the law. I doubt if anybody in this room sticks rigidly to every line of every law. Fly-posting, as Mr Smart says, has been going for a long time. We know that it is illegal. There are many other things that happen in the area that are illegal. We have cut back very substantially. The council can come to us at any time; any council can. You may have allowed us to behave in a way that now you say are wrong to be there or should not be there? Is this entirely for the councils to deal with or you say the poster companies? Would you feel a damage you have done? Would you feel a responsibility, with the possibility of losing your property or being indicted yourself for this present activity, would be the effective way to stop fly-posting?

Mr Holman: I think you are going to the extreme end of what we said. We have said all morning so far that we will work with councils. We have a job of marketing the business. We have used a method which, I accept, is an environmental crime. For many businesses of our type it has been—maybe “acceptable” is the wrong word but local councils have not reacted against it. Now it is clear that this is a bigger issue and we should perhaps have addressed this earlier but we are now trying to make sure, which perhaps we should have done before, that we working within the law. We will continue to fly-post in the sense of putting up short-term posters but only, as far as we can possible control it, on legal sites. It is not a financial issue. It is a matter of trying to work within the law and the fact that the law has not been enforced before may have allowed us to behave in a way that now in retrospect we see is not acceptable.

Q260 Paul Flynn: I am sorry to interrupt you, but is it not true that you used fly-posting when your company was being established to make your name and now you are profitable you do not need to do it and that is the reason you have stopped?

Mr Smart: We do need to do it. It is very important.

Q261 Paul Flynn: So you will carry on?

Mr Smart: If it came to a stage where it was against the law, that we were not using sites that were even—

Q262 Paul Flynn: It would have to hit you in your own pocket with substantial fines greater than you face now.

Mr Smart: We would just have to be informed that what we were doing and where we were doing it was no longer acceptable.

Mr Holman: We have said several times that we are now trying to make sure as far as we can that fly-posting is only going up on sites that are legal.

Q263 Paul Flynn: Why are you doing that?

Mr Holman: Because we want to obey the law.

Q264 Paul Flynn: It is nice to see you being repentant and I am sure we welcome that. One would have thought that it was the pressure from councils and others generally that has got through to you, but the real point that you have made, if you look back at your evidence, is the financial matter, that there is no serious risk to your profits from the fine if you are only fined once; it is a footnote in your expenses. Would you say that the reasonable conclusion this committee should receive from your evidence is that a huge increase in the fines and/or you as directors being responsible, with the possibility of losing your property or being indicted yourself for this present activity, would be the effective way to stop fly-posting?

Q265 Paul Flynn: So would you like to apologise for the damage you have done? Would you feel a sense of guilt about your activities as the owner of a prolific organisation?

Mr Holman: First of all, I am not sure that we are the most prolific, although our logo may appear quite a bit where other people use it. I am not sure that writing apologies is necessary, if somebody wants us to write an apology we will, but that does not seem to address many issues.

Q266 Sue Doughty: Can I explore this a little bit further because, in fairness, I think there is quite a lot of information that you have given us about you trying to clean up your act in this. You are in competition with other clubs and businesses which are all doing the same thing, what is your view of the pressure that other businesses are under? In other words, do you have any common approach where you say: “come on guys, it is not in any of our interest, we are going to clear up our act” or will you lose ground if you clean up your act and other people will continue to use these sites that you say are wrong to be there or should not be there? Is this entirely for the councils to deal with through getting to grips with it or is the industry as a whole beginning to recognise this by talking?

Mr Smart: I think the industry as a whole is hit by the fact that the amount of posters up is reducing, the amount of sites is reducing and everyone is reacting to the pressure that is on at the moment. We promote events that we feel we need to promote. Without sounding conceited, we do not have any direct competition, so if another club is doing it, it does not bother us. There is no pact for
them to stop their posters if we stop ours or anything ridiculous like that, we just advertise an event if we feel the need to.

Q267 Sue Doughty: You are not fettered; you are able to veer as appropriate for your own business without worrying about losing ground to another organisation?
Mr Smart: Yes.

Q268 Chairman: Mr Holman, you said just a while back that you are aware that fly-posting is illegal, but there is a lot of other crime in the area. Are you talking about drug dealing and gun crime?
Mr Holman: No. It was probably not a very thought out statement.

Q269 Chairman: It does not seem a very strong argument.
Mr Holman: No, it is not. I suppose there are things that happen in society—like driving at over 30 miles an hour in a 30 mile zone—which are illegal. People do it from time to time, they know it is illegal but it does not stop them. They will stop when the police stop them. I suppose there is some similarity here, when it is pointed out we should have known. We know that it is illegal, it is a method that has been used by our industry for a long time and the police have not been around. It is clear that it is not acceptable behaviour and we will change it.
Chairman: I think that is a very helpful note on which to end. We are very grateful for your time. Thank you very much.
Written evidence

APPENDIX 1

Memorandum from the Advertising Association

1. Preamble

The Advertising Association (AA) is a federation of 26 trade bodies representing the advertising and promotional marketing industry, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry that was worth over pound £17.2 billion in 2003. Further information about the AA, its membership and remit is available on our website at: http://www.adassoc.org.uk/

2. Introduction and Scope of the AA’s Response

The AA welcomes the opportunity to respond to this the fourth and final Inquiry by the Environmental Audit Committee’s Sub-Committee on Environmental Crime, this time into corporate environmental crime. The AA is also grateful to the Sub-Committee for granting it a short extension of the latter’s deadline to allow for the submission of the Association’s written evidence. The AA’s response to the Sub-Committee’s request for written evidence is limited to the issue of corporate environmental crime only as it pertains to illegal fly-posting.

For an overview of the AA’s position on this issue, please refer to the Association’s earlier submission to the Sub-Committee’s second Inquiry into fly-tipping, fly-posting, litter, graffiti and noise. That AA submission can be downloaded from the following location:

http://www.adassoc.org.uk/position/flyposting—270204.html

The principal objective of this submission is to:

— draw attention to a piece of legislation, which facilitates rapid enforcement action against those involved in fly-posting, that the AA failed to reference in its earlier submission;
— comment on the adequacy, or otherwise, of existing penalties;
— welcome the new proactive enforcement reflex that appears to have been adopted by local authorities; and
— furnish additional evidence of activity by the advertising industry aimed at discouraging illegal fly-posting.

3. The Existing Legal Framework: Another Legislative Tool for Tackling Illegal Fly-Posting

In its description of the existing framework of law that local authorities can draw upon when tackling illegal fly-posting in its earlier submission to the Sub-Committee on Environmental Crime, the AA failed to cite a sixth piece of relevant legislation. This was:

The London Local Authorities and Transport for London Act 2003 (Section 8).

This relatively new piece of, primarily transport-related, legislation received Royal Assent on 30 October 2003 and introduced fixed penalty notices for a number of offences under the Highways Act 1980.

Section 8 of the 2003 Act covers fixed penalty offences. The clause provides another potential tool for addressing the problem of illegal fly-posting. Essentially, Section 8 confers on authorised officers of either Transport for London (TfL) or a borough council in the capital the power to award a fixed penalty to any person or persons found fly-posting material onto street furniture. Payment of that fixed penalty then discharges that person of persons from any liability to conviction for an offence committed under Section 132(1) of the 1980 Act.

Section 132(1) of the 1980 Act was referred to in the AA’s submission of 27 February 2004, but not described in any detail. Section 132(1) effectively prohibits the painting, inscribing or affixing of pictures, letters, signs or other marks upon the surface of a road or upon a tree, structure of works on or in a highway. The offence is taken to encompass fly-posting placards and posters on lampposts, traffic signal control boxes, barriers and other street furniture.

Thus Section 8 of the 2003 Act represents a fast-track enforcement mechanism whereby a tangible penalty can be inflicted upon perpetrators of fly-posting without the need for recourse to the courts. Bringing a prosecution under the 1980 Act before the courts would clearly involve potential costs being
incurred not only by the offender in the event of a successful conviction, but also by either TfL or a London borough council in terms of time and effort at the very least. It may therefore be that those in central and local Government should investigate the scope for rolling such a model out more widely, if it proves that TfL and local authorities in London have in fact found Section 8 of the 2003 Act a useful enforcement tool.

4. **Adequacy of Existing Law and Penalties and Development of an Enforcement Reflex**

There are then six pieces of legislation, of which the AA is aware, that various local authorities and others can draw upon in order to tackle the problem of illegal fly-posting. As argued in its earlier submission, the AA certainly considers that whilst the powers and penalties available to local authorities are already sufficient, there has previously been a reticence on the part of many such bodies to make the most efficient use of them. This now appears to be changing for the better with local authorities apparently adopting a more proactive, imaginative and robust approach to enforcement, particularly by making use of the powers they appear to enjoy under, for example, Section 53 of the Anti-Social Behaviour Act 2003. The AA referred to that 2003 Act, as one that local authorities might be able to make better use of when tackling the problem of illegal fly-posting, in its submission to the Sub-Committee of 27 February 2004.

5. **Ongoing Industry Activity to Deter Illegal Fly-Posting**

The advertising industry continues to conduct the proactive initiatives to deter illegal fly-posting activities that the AA described in its submission of 27 February 2004. As a recent concrete example of continued activity in this area, please find at Appendix 1 a copy of a Guidance Note on this subject, which was issued by one of the AA’s members—the Incorporated Society of British Advertisers (ISBA)—to its own constituent organisations as recently as August 2004. ISBA also news released the issuing of that Guidance Note on 9 August 2004 in order that attention might be drawn to the issue in the advertising trade press. A copy of that news release is also attached at Appendix 2.

6. **Oral Evidence**

The AA trusts that the above evidence provides a useful supplement to its earlier submission to the Sub-Committee on the problem of illegal fly-posting. As before the AA stands ready to give oral evidence before the Environmental Audit Committee’s Sub-Committee on Environmental Crime, if so called, on this particular issue.

14 September 2004

---

**APPENDIX 2**

**Memorandum from Ash Parish Council**

**House of Commons Inquiry**

*Environmental Audit Committee—Corporate Environmental Crime*

Thank you for the opportunity to respond to the above document, which was considered by the Planning Committee at their meeting on 23 August 2004. Their response to the final part of the enquiry is as follows:

1. It was agreed that the bodies responsible for investigating and prosecuting corporate environmental crime do not have sufficient powers and resources.
2. The penalties for corporate environmental crime do not appear adequate. We suggest that fines could be made proportionate to the size of the company committing the crime.
3. It was agreed that the criminal justice system should continue to deal with corporate environmental offences.
4. The Committee did not agree that there are too many environmental duties and responsibilities on corporate bodies, however the Committee felt that they did not have enough information to comment on the question of the application of laws and regulations.

---

1 ISBA is the single body representing the interests of UK advertisers in all areas of marketing communications, including direct marketing, sales promotion, media advertising, interactive advertising and sponsorship. ISBA has around 300 member companies whose total spend on all marketing communications activities approaches £10 billion.
5. No, the Government is not doing enough to educate the business sector in terms of their legal obligations with regard to environmental issues which have an impact on their business. There should be more dialogue and co-operation across Government and the business community to ensure best practices are met.

September 2004

APPENDIX 3

Memorandum from Clevedon Town Council

Clevedon Town Council have discussed the questions raised in the document as provided via NALC; House of Commons Inquiry Environmental Audit Committee “Corporate Environmental Crime” dated 28 July 2004 and would respond as follows (using the paragraph numbering in the document):

As Clevedon has a one large area and a few smaller areas of contaminated land within its boundary,—one of which, if it happened today, could be considered “corporate environmental crime”. Along with, until recently, a working quarry there is a general interest in such issues, however;

1. It is considered there is insufficient knowledge and experience of the subjects to allow the Town Council to make valid comments on the question—except to say that the Town Council certainly supports the issues in the second part of this question ie the need for “robust and effective investigations etc . . .”

2. As for the first part of the response to (1) above.

3. The Town Council agrees with the examples given and has no further proposals to put forward.

4. First question (i); The Town Council believes not. Second question (ii); again insufficient experience & knowledge.

5. As 4 (ii) but the Town Council would certainly support the need to enlist the maximum co-operation with the business community in this important area. Whether willingly or by appropriate legislation or other pressures.

September 2004

APPENDIX 4

Memorandum from EEF—The Manufacturers Organisation

1. Do the bodies responsible for investigating and prosecuting corporate environmental crime have sufficient powers and resources to do so? Are they able to conduct robust and effective investigations into the source of the crime and mount effective prosecutions that target those who are responsible for the crime, as well as the person actually committing it?

The Environment Agency, the Scottish Environmental Protection Agency, Environment and Heritage Service, and Local Authorities have sufficient powers to carryout investigations and ultimately prosecute where necessary. However, these agencies face increasing pressure on their resources with the escalating volume of environmental legislation that is being implemented in the UK. Where fines are used as a penalty, we fully support the hypothecation of these fines back to the Local Authorities; EA, SEPA and Environment and Heritage Service as additional funding for enforcement.

2. Are the penalties for corporate environmental offences adequate? If not, how can penalties and punishment be better targeted to ensure that the criminal justice system is effective in acting as a deterrent?

No, evidence suggests that at present the criminal justice system is not acting as a deterrent for companies committing corporate environmental offences. EEF believes that there should be higher fines for more serious incidents and a greater focus from the regulators on using enforcement as a tool for change.

In addition, we note an article published in The Independent on 28 August 2004 reporting that judges are to be given tough powers to protect Britain from pollution and over-development under proposals for a new environmental court. EEF’s view is that this court will be ineffectual unless a full review of the current penalty system for breaches of environmental law is undertaken.

3. What alternatives, outside the criminal justice system, should be considered for dealing with corporate environmental offences in order to reduce environmental harm by business? Should there be greater use of alternative means of punishment, such as the use of prohibition notices, civil penalties and the confiscation of company assets?

For many large, multinational organisations the use of fines as a penalty for dealing with environmental offences is insufficient. The use of alternative means of punishment such as prohibition notices would be a much more powerful deterrent, particularly in the case of multiple offenders. For example, if after a fixed
number (e.g. 3) of offences a company was automatically issued a prohibition notice, they would be forced
to cease operation until the cause of the breach was rectified or an appeal by the company was upheld. EEF
does not support the use of civil penalties or confiscation of company assets.

4. Are there too many environmental duties and responsibilities on corporate bodies which serve only to stifle
their ability to compete in the market place? Are the laws and regulations applied uniformly across the
business sector?

The past four years has seen a significant period of activity in the implementation of new environmental
legislation that places new requirements on business. We accept that some environmental legislation is
necessary but question whether much of the legislation that has been implemented over recent years is
actually delivering improved environmental protection. There appears to be a lack of a coherent overall
strategy—the relationship and linkages between the various regulatory requirements are not clear. Industry
needs to be given time to adjust to the new requirements being placed on them and Government needs to
assess the effectiveness of these requirements before implementing further pieces of environmental
legislation.

For some time we have been urging government to give business much earlier notice about legal changes.
Issues of non-compliance with legislation are exacerbated when industry is left in the dark until very late in
the legislative process but still expected to meet the new requirements on time. Government should give
industry early warning about possible legislative outcomes—for example, the hazardous waste requirements
of the Landfill Directive were agreed in 1997, yet we are still waiting for UK regulations and uncertainty
within industry will continue until these important requirements come into force.

5. Is the Government doing enough to educate the business sector in terms of their legal obligations with
regard to environmental issues which impact on their business? Is there sufficient dialogue and co-operation
across Government and the business community to ensure that best practice, for example, can be shared?

In order to raise awareness throughout the business sector it is essential that the Government provide
early, practical information highlighting the changes that are coming and what companies will need to do
in order to comply. This information should take the form of short leaflets, press releases and short seminars.
Government need to work more effectively with sector associations and other stakeholders to develop and
deliver this.

Business organisations such as EEF work hard to ensure that its membership is fully informed of new
legislation, which could impact on them. However, access to some government forums for sector
associations is sometimes restricted. We feel that all sector associations should have access to these Forums,
this way the business sector can convey their views back to Government and sector associations can brief
their members on the latest developments.

The government funding of programmes such as Envirowise and Action Energy provide advice, guidance
and dissemination of best practice to business. However, research within our membership has shown the
level of service provided by these programmes is sometimes inadequate. We fully support the service that is
provided through these programmes but feel there is significant room for improvement to be made in both
the effectiveness of the service and the level of take up of these services.

September 2004

APPENDIX 5

Memorandum from ENCAMS

INTRODUCTION TO ENCAMS

Environmental Campaigns Ltd, or ENCAMS as we are known, is the charity which runs the Keep Britain
Tidy campaign. Our corporate mission is:

To create effective action by our targeted groups to achieve a sustained improvement in local environmental
quality and reduce anti-social behaviour.

It is well recognised that litter, graffiti, fly-tipping, fly-posting, dog mess or neighbourhood noise have a
damaging effect on the public spaces we all regularly use, such as residential streets, town centres, local
parks, beaches, rivers and recreational waters, and thus harm peoples’ quality of life. However, these are
often complex issues to put right involving a variety of agencies with responsibilities to maintain and manage
local environments. ENCAMS works with the whole range of local authorities, organisations, landowners
and private sector agencies to improve the liveability of local environments.

We have in recent years undertaken a number of projects on behalf of the Department for Environment,
Food and Rural Affairs the government department which grant-aids ENCAMS. We were commissioned
to draft a Voluntary Code of Practice for the Fast Food Industry and are currently in the early stages of a
revised and updated version of the Code of Practice on Litter and Refuse. ENCAMS has a long track record
of supporting local authorities with over 170 throughout the UK working with us on our People & Places
Programme. The People & Places Annual Conference brings practitioners together and ENCAMS’ annual
Awards recognise best practice in local environmental quality. (See Annex 1 for further examples of
ENCAMS activities).

Campaigning is central to how ENCAMS reaches its targeted groups. Campaigns can be national or local
but all are evidence-based, using market research techniques to analyse in depth why people behave the way
they do and discover what would make them change their behaviour.

Written Evidence

This submission specifically concerns corporate responsibility in relation unauthorised advertising (fly-
posting), which we would be grateful if the Committee will consider as part of its inquiry.

Environmental crime is a broad term and can cover a wide range of issues. ENCAMS believes the
corporately-backed flyposting described below falls within the definition of corporate environmental crime
because of its damage to the physical environment, detriment to communities, its clean-up costs, links to
anti-social behaviour and because of its deliberate nature.

BACKGROUND

ENCAMS research found that 83% of local authorities have a problem to some degree with flyposting.
The majority found it difficult to provide accurate clean-up costs and there was a wide variation in what
local authorities estimate they spend. 25% said they did not spend anything during April 2002—March 2003.
However, some badly affected areas undoubtedly bear a very high cost burden. ENCAMS believes that a
good proportion of the £342 million of public money that is spent every year clearing litter is used to combat
flyposting.

Flyposting is unpopular with the general public with residents rating the problem of flyposting ahead of
discarded needles as an anti-social act, just behind graffiti and abandoned vehicles.

A flyposting core cities group on which ENCAMS is represented meets every three months to discuss
flyposting legislation and the various ways of tackling flyposting across the UK. This group has provided
ENCAMS with an invaluable insight into the problems caused by flyposting and the difficulties faced by
local authorities. What became clear is that flyposting:
— is mainly an urban, particularly city, phenomenon;
— is broadly aimed at the youth culture;
and that much of it is well organised, disciplined and highly profitable.

Why Flyposting is Corporately Irresponsible

The offence seems worse when we realise it is often legitimate companies with huge budgets at their
 disposal who are responsible for flyposting. It is a well established marketing device in the music industry.
It flourishes because companies exploit weaknesses in the anti-flyposting laws. Not only do companies
themselves benefit financially from this cheap form of advertising, so do the flyposters. London-based
Diabolical Liberties, which bridges the gap between companies who want to advertise and the individuals
doing the flyposting, was recently reported as having a turnover of £8 million.

Camden Council has taken a well-publicised stand against flyposting by applying to the courts for Anti-
Social Behaviour Orders against Sony Music, BMG music company and Diabolical Liberties. Removal of
posters costs Camden Council taxpayers around £250,000 a year. Despite 50 successful prosecutions for
flyposting in two years, many of them against BMG, the activity continued unabated. It costs companies at
least £40,000 for a legal, mainstream advertising campaign in Camden. By contrast, the fines they receive for
flyposting have never been more than £750. So they regard flyposting as well worth the risk of prosecution.

ENCAMS’ Campaign

In October 2003 ENCAMS launched a media campaign, which aimed to get six major companies to cease
all flyposting activity. Research into the amount and type of flyposting was undertaken in six major cities
across the UK. Details of the worst flyposting offenders were compiled and from this research eight of the
worst offenders were targeted. The companies targeted were: Sony, Warner, EMI, Universal, BMG,
Independiente, 11 88 88 and the McKenzie Group (Carling Academy).

For the media launch an open top bus with ENCAMS staff protesting and a Sex Pistols punk rock tribute
band playing on top visited three of the biggest offenders Sony, EMI and Warner. Letters of protest were
hand delivered to the Chief Executive of these companies and a further five companies received a letter of
protest at the same time.

The campaign was supported by the Chartered Institute of Marketing and the Marketing Society who
provided supporting quotes for the media. They also contacted their members reminding them that
flyposting is an illegal activity and an illegitimate means of advertising.
Results

In response to our campaign EMI and Universal both confirmed that they knew that flyposting was illegal and that they would remove any flyposting that they were made aware of. They also informed their staff and any third parties that worked for them that flyposting was not acceptable.

McKenzie Group assured us that they did not flypost themselves but they employed third party agencies to promote all their events. They sent ENCAMS a copy of their contract with these agencies, which states that they should not flypost.

Following our campaign BMG conducted an internal review of their policy regarding flyposting and agreed to ensure that all of their staff were aware that flyposting was not an acceptable form of advertising.

11 88 88, Sony or Warner did not immediately respond to the letter of protest but ENCAMS are continuing to work with the core cities flyposting group to ensure that the pressure is kept up on these companies to cease all flyposting.

Subsequent anti-flyposting activity

Since ENCAMS’ campaign several local authorities have continued to find innovative ways of tackling flyposting particularly in terms of taking forward prosecutions. Some examples of these are:

Nottingham

In May 2004 Nottingham City Council, in conjunction with the Crown Prosecution Service and the police, secured an Anti Social Behaviour Order for flyposting against Glen Clarke, who works for Street Media Distribution Limited (an organisation believed to be linked to Diabolical Liberties). They applied for a two year Anti-Social Behaviour Order (ASBO) on the grounds that flyposting caused “distress” and “alarm” to local residents and businesses.

The judge agreed and stated that flyposting clearly demonstrated distress and alarm; it is believed that this is the first time this has been legally accepted as an anti-social behaviour act. The judge granted a two year ASBO on Mr. Clarke, who not only cannot flypost in the city of Nottingham during that period (otherwise he receives an automatic 28 days in custody), but he must not be found with posters or paste in his possession within that timeframe. Mr. Clarke was also fined £300.

Westminster

In June 2004 Westminster sent out postcards to the home address of company directors who had flyposted in Westminster. The postcards informed them that they could be charged with criminal damage for their involvement in flyposting and even face disqualification from running a company. The directors were then asked to complete the postcard outlining their intentions regarding the use of flyposting. A supporting web site www.streetbling.co.uk was also set up naming and shaming those companies that had flyposted and asking for people to register their support online.

Camden

In June 2004 Camden served an ASBO on two high level executive from Sony and BMG arguing that these executives personally authorised flyposting knowing it was against the law. Camden had staff working undercover in both organisations over a period of months in order to build up a case of evidence.

Following the ASBO Sony contacted Camden and requested that they make a deal to stop the full ASBO being served. It was agreed through the courts that if Sony made a full apology admitting their involvement in flyposting and agreed not to flypost in Camden again then they would not serve the full ASBO.

BMG however have managed to avoid the ASBO by claiming that the member of staff that received the interim ASBO no longer works for the company. This means that Camden will have to start again if they do want to serve the ASBO on another member of staff.

Latest Development

Defra recently set up a Flyposting Action Group which will consist of local authorities, representatives from ENCAMS and relevant government departments. It is intended that this group will meet on a regular basis to consider possible changes to legislation and look at ways of dealing with the problem of flyposting.

Recommendations

1. This type of environmental crime is still going unprosecuted and insufficiently punished. Loopholes and weaknesses in the law remain, despite recent measures such as:

   (a) Increase of fines from £1,000 to £2,500 under the Anti-Social Behaviour Act 2003
(b) Authorised Council officials able to issue £50 fixed penalty fines to persons caught flyposting. We hope that the Defra Clean Neighbourhoods Consultation will go some way towards addressing the legal aspects of flyposting.

2. Typically, magistrates’ court fines are between £75 and £2,000. We would encourage courts to impose fines more towards the maximum of £2,500.

3. It is notoriously difficult to catch and prosecute the individuals who carry out flyposting, and just as difficult to catch and prosecute the companies who benefit from it. A company which advertises illegally has always been able to use the legal defence of ignorance or lack of consent, unless it can be proven it knew, ordered or financed such illegal advertising.

4. Flyposting cross-cuts several government departments: Defra, ODPM, Home Office, DfT, DCMS and, to some extent, DfES for education on citizenship. It will be vital to ensure co-operation across all Departments.

5. ODPM’s Public Service Agreement 8 on Liveability should include combatting flyposting, as should the Beacon Council Scheme Round 6 theme of Effective Environmental Health.

6.ENCAMS is keen to undertake further research to understand attitudes and behaviour towards flyposting, who does it and why, what the public thinks and its impact on tourism and local economies.

7. Opinions differ on the effectiveness of authorised flyposting sites. ENCAMS recommends an examination of such schemes, with guidance for local authorities considering authorised sites.

8. We would encourage changes to the law which allow bodies other than local authorities to prosecute where properties are defaced by flyposting.

9. A useful resource would be for local authorities to maintain a database of offenders so they can work in conjunction with each other. It is worth considering whether local authorities can co-ordinate prosecutions so that several cases can be heard together, especially where they are geographically close e.g. Manchester, Liverpool, Leeds and Sheffield.

Conclusion

Despite much that is being done to combat the blight of flyposting, we remain concerned that companies—particularly music ones—are so reluctant to relinquish this form of advertising. Companies think it enhances their “street cred.” But flyposting is a criminal act which, when combined with litter, fly-tipping or other indicators of environmental neglect, can make an area feel uncared for. These are not offences committed through ignorance or lack of awareness but by corporate bodies who choose to circumvent the law.

September 2004

Annex 1

Summary of recent ENCAMS activity on fly-tipping, fly-posting, litter, graffiti, noise and other local environmental issues:

— MPs’ Pack to assist in dealing with constituency enquiries about the local environment at www.encams.org
— Establishment of Audit Commission Best Value Performance Indicator 199 on Litter and Detritus, together with free self-help training programme (on behalf of Defra).
— Annual Conference for Local Environmental Quality Practitioners to be held February 2005, at which People & Places Awards will be presented.
— Four public campaigns a year. Recent ones have incuded: neighbour noise, car litter, dog fouling, fly-posting, teenage littering, graffiti and abandoned vehicles.
— Graffiti Community Clean-up Kit produced jointly with Neighbourhood Renewal Unit for use by warden schemes (previously produced Litter Clean-up Kit for NRU).
— Voluntary Code of Practice for the Fast Food Industry, on behalf of Defra (consultation stage completed).
— Revised Code of Practice on Litter and Refuse, on behalf of Defra (at draft revision stage).
— Programme of Training Courses for LEQ practitioners on Fly-Tipping, Abandoned Vehicles, Graffiti, Beach Management, Litter Enforcement, etc.
— Blue Flag Award for clean beaches: 105 awards in 2003.
— Media coverage on LEQ to the value of £16 million in 2002–03.
— Enforcement seminars jointly with Defra involving the Environment Agency, Magistrates’ Association, Local Authorities and legal experts to improve understanding of environmental offences.
— Series of Clean Neighbourhoods Consultation seminars jointly with Defra to raise awareness of the consultation.
— Conference on Drugs Related Litter held in February 2004.

Further information on these and other activities (including research reports, publications and Eco-Schools Programme) obtainable from ENCAMS’ website at www.encams.org

APPENDIX 6

Memorandum from English Nature

INTRODUCTION

We are the statutory body that promotes the conservation of wildlife and geology throughout England. We work for wildlife in partnership with others by:
— advising the Government, other agencies, local authorities, interest groups, businesses, communities and individuals on nature conservation;
— regulating activities affecting nature conservation sites;
— helping others to manage land for nature conservation through grants, projects and information; and
— enthusing and promoting nature conservation for all.

We have legal responsibilities for nationally important nature conservation sites known as Sites of Special Scientific Interest (SSSIs), the most important of which are managed as National Nature Reserves.

There are more than 4,100 SSSIs in England covering over a million hectares, or about 7.6%, of England. SSSIs represent the very best of the rich variety of wildlife and geology that makes England’s nature special and distinct from any other country in the world. SSSIs can be small areas that protect populations of a single species or large expanses of upland moorland or coastal mudflats and marshes. The smallest SSSI is a seven metres square roof space in a private building in Gloucestershire used as a roost by lesser horseshoe bats. The biggest is The Wash covering a vast 62,000 hectares of coastal and marine habitats and which is also of international importance for birds. Over 800 SSSIs also support internationally important wildlife sites such as Special Protection Areas, Special Areas of Conservation and Ramsar sites.

OUR ENFORCEMENT ROLE

Section 28 of the Wildlife and Countryside Act 1981 as replaced by Schedule 9 to the Countryside and Rights of Way Act 2000 (“the Wildlife and Countryside Act”) gives us the power to make sure SSSIs are protected and managed effectively now and in the future. As part of our work, we are responsible for enforcing this section of the law and can take appropriate enforcement action when the law is broken and when the habitat and features of SSSIs are damaged, disturbed or destroyed. We use a range of enforcement methods appropriately, effectively and quickly, to deal with these criminal offences. These methods range from information site notices and warning letters through to formal investigations and prosecutions.

We also have an advisory role in relation to investigating offences against protected species under Part I of the Wildlife and Countryside Act. The police are responsible for enforcing and prosecuting these criminal offences.

We also work with other partners to identify species and habitats that are at a significant risk from illegal activities to tackle wildlife crime more effectively.

OUR ENFORCEMENT AIMS

We consider that we are a firm but fair regulator in relation to our enforcement role.

We work with over 32,000 separate owners and land managers, many of whom work hard to conserve SSSIs. We recognise that the best way of managing SSSIs effectively is to build and maintain relationships with these owners, land managers and public organisations. In doing this, we aim to create an understanding of their responsibilities and focus efforts on positive management which we hope will reduce the damage and disturbance caused to SSSIs and the need to take enforcement action.

Wildlife and environmental crime can threaten the habitats and features within SSSIs so we have to take enforcement action to protect and restore these features. We are always disappointed when we have to take this type of action as, inevitably, the habitat or features of an SSSI have already been damaged, disturbed
or destroyed. However, we will not hesitate to use enforcement action where appropriate when offences are committed. Enforcement sends a clear message that we will not let a small number of people spoil our natural heritage which we look after on behalf of everyone.

Our main enforcement aim is to benefit nature conservation by protecting and restoring the habitats and features of SSSIs. When habitats and features of an SSSI have been damaged or disturbed, we will ask those responsible to put right the damage or disturbance caused. We will take account of any co-operation when deciding on the enforcement action to take. However, those responsible will not avoid enforcement action just because they have carried out, or offered to carry out, restoration work.

It is also worth noting that some of the enforcement action that we take is in response to activities which are carried out by people who neither own nor occupy land within an SSSI.

**PRINCIPLES OF ENFORCEMENT**

There are general enforcement principles that apply to the way in which we approach every case and how we decide what enforcement action to take. These include the following:

- **Investigate** all reported incidents of damage or disturbance to SSSIs fairly and quickly.
- **Judge** all cases individually but consistently.
- Have a balanced approach in deciding the level of enforcement action against the nature and seriousness of the offence, the attitude of the person responsible and the damage or disturbance to the SSSI, in a local, national and international context and, any other circumstances.
- **Be open** when dealing with all enforcement cases, decisions made and action taken.
- **Create** an understanding of the legislation and responsibilities, and clearly explain this and any restoration needed.
- Where damage is being caused by other people, **work closely with owners and land managers of those SSSIs** to decide the most appropriate course of action to take.
- **Work with and support other enforcement agencies** to encourage the use of appropriate powers to tackle wildlife and environmental crime.
- **Follow the Home Office guidelines** when deciding whether to serve a caution.
- **Apply** the evidential and public interest tests as outlined in the Code for Crown Prosecutors when deciding whether to prosecute.
- In all cases, consider the overall benefits to nature conservation.

**TYPES OF OFFENCE**

SSSI owners and occupiers:

- Carrying out, causing or allowing operations likely to damage an SSSI without consent.
- Failing to keep to a management notice.
- Failing to let us know about a change in ownership or occupation of land in an SSSI.

Public bodies:

- Carrying out operations likely to damage an SSSI without meeting the requirements to notify us.
- Failing to minimise any damage to an SSSI and if there is any damage, failing to restore it to its former state so far as is reasonably practical and possible.

Any person:

- Intentionally or recklessly damaging, destroying or disturbing any of the habitats or features of an SSSI.
- Preventing one of our officers lawfully accessing an SSSI.

**ENFORCEMENT ACTION**

Each enforcement case that we deal with is unique in either the way it has arisen or the effect that it has had on the individual habitat and features of the SSSI. So, it is not easy to set any guidelines about the enforcement action to take for every possible incident affecting an SSSI given the wide variety of the wildlife and geology that might be affected, or the scale and severity of damage and disturbance that could be caused. However, we will carry out an ecological assessment of the damage and disturbance caused based on the scale, vulnerability and rarity of the habitat and features of the site in a local, national and international context.

We use a range of enforcement methods to deal with cases. Depending on the circumstances of the incident, we may use one or more enforcement methods at the appropriate time during different stages of the case. In some cases, one level of enforcement action may be appropriate and effective in dealing with the incident. In other cases where an earlier enforcement action has been unsuccessful, legal obligations continue not to be met or damage and disturbance carries on, we will consider further enforcement action.
We will investigate an incident as soon as possible after we have become aware of it. We will try to contact the landowner or land manager to discuss the incident and get permission to visit the SSSI to assess the damage or disturbance and collect evidence. If we are unable to get permission for a visit, we have a legal power to enter the land to find out if an offence is being or has been committed.

We will assess the facts of the incident and take the appropriate enforcement action. In cases where we need to get legal advice, carry out a formal investigation or have discussions with other enforcement agencies, it may take us longer to make a decision and take the appropriate action.

The enforcement methods that we regularly use are given below.

**Information and awareness**

In some cases, information and awareness is the best way to stop certain activities. For example, we may use site notices and leaflets to tell people about the habitat and features in the SSSI and the offences they could be committing.

**Letters**

We may decide that it is appropriate to send a warning letter to the people or organisations who are responsible. If this is the case, we may ask those responsible to agree that the unauthorised activities will stop and restoration work will be carried out.

**Formal investigations**

In certain circumstances, we may decide that a formal investigation is appropriate to collect evidence. In carrying out a formal investigation, we will use trained investigators and follow the legal requirements of the Police and Criminal Evidence Act 1984 and Codes of Practice made under it.

**Cautions**

In cases where we think that a prosecution is not appropriate but a high level of enforcement action should be taken, we will then consider a formal caution. We will only consider a caution where the necessary evidence we have collected shows that there is a realistic chance of conviction. As a prosecuting authority, we will follow the Home Office guidelines as they apply to cautioning. If an individual who has been previously cautioned is later prosecuted for another offence under section 28 of the Wildlife and Countryside Act, we will bring the previous caution to the court’s attention.

**Prosecution**

We have a discretionary power, not a duty, to prosecute for offences relating to SSSIs. We will only prosecute where the evidence we have collected shows that there is a realistic prospect of a successful conviction and where we think that it is in the public interest to do so. If we prosecute, we will always try to recover the costs of the formal investigation and legal proceedings. We will also publicise successful prosecution cases widely to the national, local and specialist press.

As well as providing specific penalties, the legislation also allows a court to consider any financial benefit the offender has gained or may gain as a result of the offence.

Wherever appropriate following a successful prosecution, we will apply to the court to make a formal restoration order. This will order the offender to restore the damaged area of the SSSI to its condition before the offence was committed (at the offender’s own expense).

**Civil action**

In certain limited circumstances, the only option to prevent damage, disturbance or destruction to SSSIs is to take civil action to get an injunction or a possession order. We will only take this sort of action after voluntary co-operation or other enforcement methods have been explored and there is still a serious threat to the SSSI.

Where unauthorised camps are present on National Nature Reserves that we manage, we will make a reasonable effort to get them to leave voluntarily. However, if the unauthorised camp does not leave, where we have the necessary legal power to do so, we will apply to the civil courts for a possession order to remove them. We will also support landowners and other organisations in their action to remove unauthorised camps from those SSSIs which they own or are responsible for.
Activities of People Other than Owners and Occupiers of SSSIs

Many of the cases of damage and disturbance to SSSIs are carried out by people who neither own nor occupy land within SSSIs. We realise that this type of wildlife and environmental crime can be tackled by working with landowners, local communities and other agencies such as local authorities and the police. We fully support this positive partnership approach and we welcome working together to offer advice on nature conservation, the enforcement action that can be taken, and agree positive solutions to benefit nature conservation. In some cases, where practical, it may be appropriate for us to offer the landowner funding to carry out work to secure the site from future unauthorised use.

The enforcement action and the legal process for dealing with such unauthorised activities will depend on the nature of the activities, the offence being committed and the legal powers available to landowners and enforcement agencies. Very often, these activities not only break the law under the Wildlife and Countryside Act but break other legislation as well, such as the Road Traffic Act. In some cases, it can sometimes be difficult to get the necessary level of proof needed for a criminal prosecution under the Wildlife and Countryside Act. In this situation, we will try to work with the other enforcement agencies, such as the police, who may have more appropriate enforcement powers to tackle this type of crime. In some cases, this may lead to a prosecution under legislation other than the Wildlife and Countryside Act.

Other Information

This document sets out our enforcement policy statement. It is not intended to be a detailed guide to the law (please refer to the relevant legislation and get legal advice if necessary). There are details of the Wildlife and Countryside Act 1981 (as amended) and the Countryside and Rights of Way Act 2000 on Her Majesty’s Stationery Office website at www.hmso.gov.uk.

There are more details of our business and contact details on our website at www.english-nature.org.uk. We have a formal comments and complaints procedure which we use to deal with an enquiry, suggestion or complaint we receive about the way in which we have dealt with an enforcement case or any other area of our work. Details of this are also on our website.

We have also signed up to the Cabinet Office and Local Government Association’s Enforcement Concordat. This is a voluntary non-statutory code of practice which sets out what businesses and other organisations we regulate can expect in relation to our enforcement work. The Concordat is on the Cabinet Office website at www.cabinet-office.gov.uk.

September 2004

APPENDIX 7

Memorandum from the Environmental Industries Commission (EIC)

Re: EIC SUBMISSION ON INQUIRY INTO CORPORATE ENVIRONMENTAL CRIME

Thank you for the opportunity to take part in this inquiry. We set out below the views of the EIC on some of the questions the Environmental Audit Committee is considering, as well as raising some additional points we believe to be of relevance to the Committee’s inquiry.

Introduction

The Environmental Industries Commission (EIC) was launched in 1995 to give the environmental technology and services industry a strong and effective voice with Government.

With over 240 Member companies EIC has grown to be the largest trade association in Europe for the environmental technology and services industry. It enjoys the support of leading politicians from all three major parties, industrialists, trade union leaders, environmentalists and academics.

Adequacy of Enforcement Bodies

EIC is concerned that the Government’s measures to stop companies polluting for free are being undermined in practice by failures to enforce the environmental protection policy measures that are in place.

This is the message we receive daily from Members working on the front line of environmental protection. Whether it is the Part IIA regime in the contaminated land sector; LAPC in the industrial air pollution control sector; the Building Regulations in the climate change sector; or Oil Storage Regulations and discharge consents in the water sector; the message is the same: under-funded and inconsistent enforcement, coupled with derisory fine levels by the Courts, is undermining environmental policy objectives.
EIC strongly recommends, therefore, that enforcement bodies, particularly the Environment Agency, are given resources adequate to fulfil their responsibilities. The Environment Agency is faced with major new responsibilities, springing from the Water Framework Directive, the Emissions Trading Directive, and a host of other regulations. Generally these new responsibilities come with little or no additional funding. This clearly cannot continue without undermining still further their effectiveness.

Whilst environmental legislation must be enforced in order to deliver its policy objectives, the associated “red tape” costs must be minimised. There are also clearly limits to the amount of public resources that can be devoted to enforcement. Therefore, consideration should be given to innovative approaches to regulation which encourage the private sector to take on some of the costs and duties of enforcement, such as the example of an “MOT” for oil storage tanks given below under “Alternatives to the Criminal Justice System”.

**Risk Based Regulation**

The Environment Agency and other regulators are increasing moving towards risk based “smarter regulation”. EIC believes there is a strong case for risk based targeting and allocation of resources in environmental regulation—however this approach needs to be introduced carefully and properly resourced if it is not to undermine the environmental regulatory framework, particularly by giving a green light to environmental regulation—however this approach needs to be introduced carefully and properly resourced if it is not to undermine the environmental regulatory framework, particularly by giving a green light to those processes rated as low risk to ignore regulatory controls.

EIC therefore supports the introduction of risk based regulation but believes the following principles should be retained as risk based enforcement approaches are implemented:

- There must be a baseline of inspections etc for effective environmental regulation irrespective of any risk.
- There must be an enforcement policy, including prosecution, which is as rigorous in dealing with non-compliance in non-targeted areas as that applicable to the targeted areas.
- The assessment of the level of risk must be done rigorously and reviewed at least yearly—as well as when there are significant changes to the operation or ownership of the process.

**Fine Levels**

EIC considers that fines must be high enough to encourage businesses to make the investment in environmental technology, effective environmental management systems and staff training necessary to ensure legal compliance with environmental regulations. Low fines send the wrong message in trying to create a culture where environmental compliance is taken seriously by industry.

The experience of EIC Members is that companies too often find it more economical to pay a fine than to properly address their environmental performance. EIC, therefore, believes that the current fines for environmental offences are both too low and inconsistent and that they need to be dramatically raised to have a real economic impact and deter companies from polluting the environment.

The experience of EIC Members is supported by recent research on behalf of DEFRA. “Trends in Environmental Sentencing in England and Wales” reveals “a lack of consistency in environmental sentencing”. It also notes that, whilst there has been a small recent increase in fine levels in Magistrates’ Courts (to an average £2,730 in 2001–02), fine levels have actually dropped sharply in Crown Courts (to an average £4,600 in 2001–02). It is clear that fines at this level are not a deterrent even to small companies, let alone to large corporations.

It is instructive to compare these sentences with those handed out in the USA, which regularly reach millions of dollars. For example in October 2003 Chevron Texaco paid a $3.5 million civil penalty for air emissions and reached an agreement with the US EPA to spend an estimated $275 million to reduce emissions at five refineries.

In the UK, fines for companies who behave anti-competitively regularly amount to millions of pounds. Argos was recently fined approximately £17 million for price fixing, whilst Littlewoods was fined approximately £8 million.

Experience suggests that a focus on corporate liability alone is not by itself sufficient to ensure acceptable standards of behaviour. Making directors and other decision-makers in a company responsible for the activities of their companies, is increasingly regarded as an effective mechanism for increasing standards.

In addition to punishing companies/directors for environmental damage, cleaning up the damage is also important. Whilst there is statutory provision for the criminal courts to order an offender to remedy the environmental harm caused, it is not apparent that this is often used. Earlier guidance to magistrates recommended a greater use of compensation orders but this does not appear to have occurred (this may be because of uncertainty in applying the concept to environmental offences). In competition law, other mechanisms for dealing with offenders, aside from public law enforcement by way of sanctions, include provision for victims of any anti-competitive behaviour to sue offending companies for losses incurred. For example, having been fined for price fixing of vitamins, Hoffman La Roche was sued by companies incurring resulting loss.
ALTERNATIVES TO THE CRIMINAL JUSTICE SYSTEM

Competition law adopts a dual pronged approach—companies may be subject to substantial civil penalties, whilst individuals are subject to criminal sanction and may also be subject to disqualification as a director. In addition there are significant incentives to encourage individuals to disclose wrongdoing by corporates, including immunity from prosecution.

Furthermore there should also be more focus in the Courts on ordering measures to prevent future pollution incidents and in particular the use of Best Available Techniques to prevent and control pollution in the future. This is a major feature of sentencing for environmental cases in the USA.

Recent research sponsored by Defra has advocated a new system of civil penalties for environmental offences to allow a more proportionate response to lesser offences. Part of the rationale for the suggestion is that criminal prosecutions can be difficult and time consuming. Experience suggests that regulators can be reluctant to take the draconian step of initiating a prosecution.

The competition authorities may provide a useful model in this regard (the Office of Fair Trading and the Competition Appeals Tribunal). By analogy the Environment Agency could be provided with powers to fine companies who fail to comply with regulations. A right of appeal to a specialist tribunal would satisfy human rights requirements and ensure that specialist bodies are taking decisions on sentencing. The use of the criminal law could be reserved for the most serious offences where the opprobrium associated with criminal sanction is appropriate. This has the advantage of avoiding the current position where, as liability for environmental offences is in most cases strict, companies who behave well and are, for example, the victims of vandalism causing environmental damage, will nonetheless be guilty of criminal behaviour.

It is also worth considering ways to shift the burden of enforcement onto the private sector. One example is the Oil Storage Regulations, for which the Environment Agency have no budget for inspections or even for compiling a directory of installations covered. EIC has proposed that an MOT-style certification regime be implemented for oil storage tanks. The MOT should be supported by a register of technicians who install and maintain oil tanks and have the power to condemn tanks. It should also make it illegal to deliver oil to a tank without an MOT certificate.

This system needs to be a statutory arrangement rather than a voluntary one. Any voluntary arrangement will result in irresponsible companies taking business from responsible ones, thus penalising those who abide by the laws. If a company refuses to deliver to a tank without an MOT, another less scrupulous company will deliver, probably at an increased margin. If it were against the law to deliver to a tank without its MOT, the system would be much more effective in protecting the environment from oil spills and provide companies with a level playing field, at little or no cost to Government.

REGULATION AS A SPUR TO COMPETITIVENESS

Environmental protection policy is in place to correct a market failure—the lack of a price on pollution. It is therefore essential to the proper functioning of the market. Pollution that is not paid for by its creator will be a cost to other industries—in lost resources (forestry and fishing), lost value (tourism), lost labour (sick days), or higher charges for insurance, maintenance, etc. Pricing pollution properly encourages prevention rather than remediation (because it is less expensive), and makes industry as a whole more competitive.

Experience in a range of industries has indicated the benefits to companies of clearly prescribed and consistently enforced environmental standards through competitive advantages in both the home and export markets. In particular such standards can increase profits through encouraging industry to examine its resource efficiency (for further details see the recent European Commission report “Commission Staff Working Document: The Effects of Environmental Policy and European Business and its Competitiveness A Framework for Analysis” 10.06.2004).

Environmental protection policy is also the key driver of the rapidly growing environmental technology and services (ETS) industry. The world market for the (broadly defined) environmental sector is estimated at US$515 billion—comparable with the aerospace and pharmaceutical industries—and it is forecast to grow to US$688 billion by 2010. At the heart of this environmental sector is the ETS industry. The UK lags behind the leaders in this market—Germany, Japan and the USA—who have implemented, and enforced, high environmental standards in advance of other countries. High standards, backed up with credible and consistent enforcement, breed a strong ETS industry well placed to exploit markets in other countries as they “catch up”.

CONCLUSIONS

— Enforcement bodies are currently underfunded and underresourced to deliver credible and consistent enforcement.
“Risk based” regulatory policies can deliver more efficient enforcement, as long as care is taken that a minimum baseline of inspection frequencies applies to all levels of risk.

Current levels of punitive fines are too low to have a deterrent effect, and are much lower than similar fines in other countries, or fines for other forms of corporate crime.

Supplementing fines with criminal sentences for directors and other decision makers, and costs for clean-up and remediation, should be considered.

A system of civil penalties for minor infractions and failure to comply with regulations would provide a much more balanced and efficient way of achieving compliance.

Environmental regulations and their enforcement make industry as a whole more competitive, encourage mainstream industry to be more innovative and efficient, and act as a stimulus to the environmental technology and services industry.

APPENDIX 8

Memorandum from Mr Richard Kimbling

INTRODUCTION

1. This memorandum addresses the second and third questions posed by the Inquiry: (2) are current penalties adequate; (3) should alternative penalties be developed?

2. This evidence arises from reading the report and evidence from the first Inquiry. I saw that there was, understandably, little evidence from those who find themselves prosecuted or from those who have the burden of determining the appropriate sentence in environmental and related sorts of case. Therefore this memorandum aims to assist the Inquiry with some data and general experience. The evidence is no more than a note of my understanding of the way in which these cases are currently dealt with, informed by an interest and practice in environmental and regulatory crime.

The key points which may assist the Inquiry are:

(i) It is neither desirable nor necessary to distinguish fines and guidance according to the regulatory sector into which they fall.

(ii) Penalty in environmental cases is in line with other, similar, types of case.

(iii) The courts presently have a body of guidance on sentencing in cases concerned with protection of human health, public safety and the environment.

(iv) A broad framework of appropriate fines may be identified, and is evolving from the reported cases and fines. If Parliament wishes to see fines increased, it simply has to increase the maxima on summary conviction.

(v) Prosecutions are becoming more effective, principally in respect of evidence of harm arising from offences and financial gain or costs savings by defendants. This is an area which is in need of consistency and clarity of approach.

(vi) Alternative approaches to sentencing certain types of corporate offender would be effective if they resulted in improved understanding, by the defendant, of environmental hazards.

SECOND QUESTION—CURRENT PENALTIES

Environmental Crime cannot be considered in isolation.

3. Penalty for environmental crimes cannot and should not be limited to any particular regulatory area, as has been suggested. The guideline case of R v F Howe (Engineering) Ltd has become not only the principal guidance in health and safety cases but is also the root of guideline environmental cases. The similarity of sentencing principles in both areas of regulation is shown by reliance on Howe in Milford Haven and in the Magistrates Association Guidelines which are concerned with Sentencing Companies for Health, Safety and Environmental Offences.

2 Richard Kimbling PhD, Barrister, No 5 Chambers.
4 [1999] 2 Cr App R (S) 37.
5 [2000] JPL 943 CA.
4. In the same way that the courts cannot consider penalty for environmental crime in isolation from its other sentencing tasks, neither can Parliament.

**Are Current Penalties for Environmental Crime in Line With Related Offences?**

5. To continue the analogy, if one compares average fines in environmental cases with those in health and safety cases one finds them to be of the same order, but environmental offences are apparently slightly lower.

6. However it is clear that, on average, the Environment Agency charges more offences against a defendant (about four charges per case) than does the Health and Safety Executive (about 2 charges per case). When this is taken into account, the average fines are indeed similar (Annex 1). Hence one can see that the courts are applying the principle of “totality”, namely that the overall penalty is to be determined in the round, not just by toting up the number of offences and multiplying that by an amount per offence.

**Sentencing Principles and Guidelines**

7. There can be no tariff for environmental offences (Annex 2).

8. In terms of sentencing principle, interesting questions remain unanswered:

   (i) should an offence which puts human life and limb at risk result in a heavier penalty than one which puts aquatic life at risk?

   (ii) water pollution offences are truly strict (you don’t really have to do anything wrong to commit them), cf. health and safety offences for which the whole scheme of the legislation is to impose a duty to do what is reasonably practicable (wouldn’t it be better to place those conducting an undertaking under a duty to avoid pollution and prosecute for that breach rather than limit prosecution to the occurrence of polluting events?)

   (iii) for water pollution offences, how relevant to sentence is it that there is no statutory defence of having used all due diligence to avoid the offence, cf waste offences, consumer protection offences etc?

9. It is a feature of water pollution offences that even where there is environmental harm, the water body and its ecosystem recovers, even in the bad cases (for example, *Milford Haven, op cit*). Unhappily, this is not so in the case of unlawful deposit of waste. The bad cases in which large amounts of waste are deposited on farmland are often left untouched. The reasons include cost and the risk of causing more harm in removing the waste than leaving it in situ.

**Types of Offence and Defendant**

10. There is an infinite variety of case and defendant. However, the normal run of cases which come frequently before the courts do fall into categories. The bulk of cases comprise:

   (i) Water pollution and waste offences by water and waste management companies.

   (ii) Water and waste pollution from the construction industry.

   (iii) Unlawful tipping of waste soils and construction materials, either through ignorance of the relevant controls or deliberately avoiding them.

   (iv) Uncontrolled releases to the environment on agricultural land.

   (v) Packaging offences.

11. The reality is that the bulk of corporate offenders are small to medium size businesses for whom the total of fines and prosecution costs represents a significant financial burden. The means of the offender are rarely reported and so those not in court will not appreciate the balancing exercise which the court has performed: the gravity of the offence on the one hand and particular defendant on the other.

12. As in any other offence, overall culpability is the prime consideration in determining sentence, but the absence or extent of environmental harm is a key factor in sentencing environmental crime. Evidence of harm is provided by Environment Agency officers. It is important that they understand the significance of their evidence.

13. All defendants hate to be prosecuted and the larger they are, the more they hate it. The Inquiry should not underestimate the effect of the prosecution itself. The financial penalty is not necessarily the most important outcome; it is often the fact of conviction.
14. That said, the fine must be at a level to make some impact on the company and overcome any suggestion that it is cheaper to pay fines than undertake work that is necessary to prevent the offence in the first place (per Scott Baker LJ in Anglian Water).

15. Given the considerations above, criticism of current penalties probably arises from a lack of understanding some of the factors which a court properly considers. If Parliament wishes to see fines increased, it simply has to increase the maxima on summary conviction, but even then it will remain a basic principle to fine corporate defendants according to their culpability and their means.

Third Question: Alternative Penalties for Corporate Offenders

16. It is very easy to find statements to the effect that fines are too low environmental offences. It is much more difficult to find any view expressed by those companies and individuals who have been through the criminal justice system and seen how it decides their cases. There is no evidence or study of how fines affect the future behaviour defendants, save when they re-appear before the court.

17. In contrast, the Lord Chief Justice and Home Secretary continue to advocate methods of disposal of criminal cases by means which rehabilitate offenders. Their approach is to give offenders an opportunity to amend their behaviour, not to increase the element of punishment by way of longer custodial sentences. The contrast is an obvious and stark one.

18. It has been remarked upon in cases in the Crown Court which result in community sentences, that a community penalty is particularly well suited to environmental crimes.

19. It is a contrast which prompts the question, why is there no order available to a court to require that a defendant company, if it consents, to send employees or directors on a particular course or programme?

September 2004

Annex 1

A Comparison of Average Fines in Environmental and Health and Safety Cases

The background information available to the court of appeal when it decided Howe was "In the early 90s Parliament introduced the exemplary maximum fine of £20,000 for breach of the general duties under sections 2–6 of the [Health and Safety at Work] Act where the offence is dealt with summarily. Following this the average fine in the magistrates' courts (per offence prosecuted) for breaches of the general duties increased from £844 to £2,110 in 1992–03 and this has since risen to £6,223, but is still less than the maximum of £20,000. In the Crown Court where the level of fine is unlimited the 1997–98 average fine per offence was £17,798."

The low level of fines in health and safety offences was recognised in Howe.

In its report in prosecutions during 2002–03, the HSE reported a reduction in average fines in comparison with the previous year and no substantial change since Howe was decided. It expressed its disappointment, the author of the report said “I believe there is a case to answer about the low level of health and safety fines.” The average fine per case was £8,828 in 933 cases prosecuted and 1,688 offences alleged. Part of the explanation given for this outcome is that there were fewer large fines during 2002–03 than previously. If fines in excess of £100,000 are excluded, average fines were £5,796 in 1997–98 and £8,255 five years later, having adjusted for inflation.

In its evidence to the Environmental Audit Committee, the Environment Agency reported that it prosecuted 737 cases in 2002–03 and alleged 2,890 offences. This was an increase of 16% of cases prosecuted and an increase of 27% in the number of offences charged since 1999. The average fine per case was £4,424, with significantly different average fines for different type of environmental offence (higher for water quality offences, lower for waste offences).

The ERM report does not analyse its data by reference to the real features of environmental crime in different regions. This is not a criticism of the report, but explanations of some of the data should be obvious to those in practice. For example, the average fine in Wales is rather lower than elsewhere—£4,812 for the London area and £1,650 in Wales. Many of the Welsh defendants are associated with agriculture. It is well known that hill farming has suffered recent economic hardships and it is both a reflection of the defendant’s average means and a positive feature of local justice that setting of financial penalties takes account of local conditions.
THE FRAMEWORK OF FINES AND GUIDANCE

The court of appeal has consistently stated that a rigid tariff on the level of sentence is impossible. Lord Taylor CJ in R v F&M Dobson [1995] 16 Cr App R(S) 957, a food safety case, said No cases in the Crown Court comparable to the present one are available for comparison. There are no guidelines as to the level of sentencing. Perhaps it is difficult for there to be any guideline, since the circumstances in which offences of this kind occur are infinitely various. This was precisely the view taken in Howe, ie “We shall endeavour to outline some of the relevant factors that should be taken into account. In doing so we emphasise that it is impossible to lay down any tariff or to say that the fine should bear any specific relationship to the turnover or net profit of the defendant. Each case must be dealt with according to its own particular circumstances.”

An evolution of a framework of cases for comparison is anticipated in R v Yorkshire Water Services [2002] Env L.R. 18, 449 at p 454 per Rougier J. “So care should be taken to fit any penalty within the framework of previously imposed fines. So in the light of the main variables which will exist we think that any rigid approach is not realistic since that framework will necessarily be wide.” Hence, the usual practice in the court of appeal of relying on previous appeal cases to support a ground of appeal that a fine is manifestly excessive is unlikely to assist greatly; see R v Yorkshire Sheeting and Insulation Ltd [2003] Cr App R (S) per Davis J only limited guidance may be obtained from the citation of such authorities; as explained in Howe at 254b, it is impossible to lay down a tariff in cases of this kind; each case must be decided by reference to its own circumstances.

Hence it is necessary to turn to the guideline cases and the published guidance. The gravity of the breach\(^6\) or the degree of culpability\(^7\) has to be assessed. The aggravating and mitigating features which have been identified by the court of appeal are:

<table>
<thead>
<tr>
<th>Aggravating</th>
<th>Mitigating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injury or damage</td>
<td>Prompt admission of responsibility</td>
</tr>
<tr>
<td>Running risks for profit</td>
<td>Steps to remedy deficiencies</td>
</tr>
<tr>
<td>Extent of danger created</td>
<td>Good record</td>
</tr>
<tr>
<td>Extent of the breaches</td>
<td></td>
</tr>
<tr>
<td>Failure to heed warnings</td>
<td></td>
</tr>
</tbody>
</table>

Having assessed the above, the guidance in Yorkshire Water is that “a balance may have be struck between a fitting expression of censure, designed not only to punish but to stimulate improved performance on the one hand, and the counter productive effect of imposing too great a financial penalty on an already underfunded organisation on the other . . . Finally it must be correct to determine what the penalty for one incident should be rather than tot up the various manifestations of that incident as reflected in the counts on the indictment.”

The Sentencing Advisory Panel, in its first advice to the court of appeal had suggested that it might be possible to express the fine as a percentage of one or more of turnover, profitability and liquidity. This possibility was effectively rejected in Yorkshire Water\(^8\) but the concept of measuring the penalty for an offence within the framework of previous decisions was accepted and applied in R v Anglian Water Ltd [2003] EWCA 2243 in which Scott Baker LJ said, at para 31 of the judgment “. . . we think the fine of £200,000 was manifestly excessive for this single offence, particularly when measured against the total fines of £80,000 in the Yorkshire Water case.”

The appeals against sentence in Table 1 are not representative of the whole spectrum of such fines. There are few appeals from fines over £1 million, but there is a number of cases in which such fines have been imposed. Five of them were reviewed in Milford Haven.

---

\(^{6}\) Per Scott Baker J. in Howe (op cit) at p 43.

\(^{7}\) Per Rougier J. in Yorkshire (op cit) at p 453.

\(^{8}\) Op cit at p 454.
### Table 1: Summary of some appeals against sentence (Court of Appeal).

<table>
<thead>
<tr>
<th>Name</th>
<th>Date</th>
<th>Citation</th>
<th>Offence</th>
<th>Facts</th>
<th>Means</th>
<th>Fine in Court below</th>
<th>Fine on Appeal</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consumer Protection</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v Docklands Estates Ltd</td>
<td>2001</td>
<td>1 Cr App R (S) 273</td>
<td>S13 Trade Descriptions Act 1968—false indication that services had been supplied—fly-posting</td>
<td>Erecting “sold” signs on properties for which no instructions to act had been received.</td>
<td>Profits of £16,000 to £33,000</td>
<td>£22,500</td>
<td>£6,000</td>
<td>£5,200</td>
</tr>
<tr>
<td>Health &amp; Safety/Food</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v F&amp;M Dobson Ltd</td>
<td>1995</td>
<td>16 Cr App R (S) 957</td>
<td>Selling food which did not comply with the food safety requirements</td>
<td>Chocolate covered knife blade—due diligence trial.</td>
<td></td>
<td>£25,000</td>
<td>£7,000</td>
<td>£7,800</td>
</tr>
<tr>
<td>R v F Howe and Son Ltd</td>
<td>1999</td>
<td>2 Cr App R (S) 37</td>
<td>Four offences under H&amp;SAWA</td>
<td>Young man electrocuted due to damaged cable; bridged fuses; RCD bypassed—failure to check.</td>
<td>Turnover £355,000; net profit after tax £2,7000</td>
<td>£48,000</td>
<td>£15,000</td>
<td>£7,500</td>
</tr>
<tr>
<td>R v Friskies Petcare (UK) Ltd</td>
<td>2000</td>
<td>2 Cr App R (S) 401</td>
<td>S2 H&amp;SAWA</td>
<td>Welding work in a silo was undertaken without necessary precautions, resulting in the death of a technician.</td>
<td>Considerable turnover generating of £40 million Operating profit £113,000 to operating loss of £8000</td>
<td>£600,000</td>
<td>£250,000</td>
<td></td>
</tr>
<tr>
<td>R v Aceblade Ltd</td>
<td>2001</td>
<td>1 Cr App R (S) 366</td>
<td>S2 H&amp;SAWA</td>
<td>Mobile crane overbalanced, killing driver. No system of inspection and warning system bypassed.</td>
<td></td>
<td>£20,000</td>
<td>dismissed</td>
<td>£21,600</td>
</tr>
<tr>
<td>R v Keltbray Ltd</td>
<td>2001</td>
<td>1 Cr App R (S) 132</td>
<td>Reg 3 CHSAWR</td>
<td>Demolition. Cutting holes in floors—floor collapsed killing two men. Work not in accordance with control measures specified in the risk assessment, including no use of safety harness.</td>
<td></td>
<td>£200,000</td>
<td>dismissed</td>
<td>£8,000</td>
</tr>
<tr>
<td>R v Patchett Engineering Ltd</td>
<td>2001</td>
<td>1 Cr App R (S)</td>
<td>S6 H&amp;SAWA</td>
<td>Unguarded machine causing death. Company had taken advice that guarding not necessary, but HSE had twice expressed concern. Appeal on basis of means.</td>
<td></td>
<td>£75,000</td>
<td>£20,000</td>
<td>£5,000</td>
</tr>
</tbody>
</table>
Table 1: Summary of some appeals against sentence (Court of Appeal) (Continued).

<table>
<thead>
<tr>
<th>Name</th>
<th>Date</th>
<th>Citation</th>
<th>Offence</th>
<th>Facts</th>
<th>Means</th>
<th>Fine in Court below</th>
<th>Fine on Appeal</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v Avon Lippiat Hobbs (Contractors) Ltd</td>
<td>2003</td>
<td>3 Cr App R (S) 71</td>
<td>S2 and s3 H&amp;SAWA</td>
<td>Excavation and installation of gas services resulting in explosion, destruction of a house and personal injury. Inadequate risk assessment; training and supervision insufficient; no quality check on workforce; no specific warning on use of equipment; dangers not communicated to the employees. Mitigation included a good H&amp;S record, early plea, D had H&amp;S structures in place, no financial gain.</td>
<td></td>
<td>£250,000</td>
<td>£150,000</td>
<td>£44,000</td>
</tr>
<tr>
<td>Water</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v Milford Haven Port Authority</td>
<td>2000</td>
<td>2 Cr App R (S) 423</td>
<td>S85 Water Resources Act 1991</td>
<td>Serious navigational error by pilot of ship in Milford Haven. Loss of 70,000 tonnes of crude and bunker oil, polluting the Haven and controlled waters.</td>
<td></td>
<td>£4,000,000</td>
<td>£750,000</td>
<td>£825,000</td>
</tr>
<tr>
<td>R v Yorkshire Water Services Ltd</td>
<td>2002</td>
<td>2 Cr App R (S) 13</td>
<td>17 Counts of supplying water unfit for human consumption.</td>
<td>Serious and avoidable failures in proper planning and communication resulting in four separate incidents of supplying dirty water, unfit for human consumption.</td>
<td></td>
<td>£119,000</td>
<td>£60,000</td>
<td>£125,600</td>
</tr>
<tr>
<td>R v Anglian Water Services Ltd</td>
<td>2003</td>
<td>EWCA Crim 2243</td>
<td>S85 Water Resources Act 1991</td>
<td>Discharge of sewage from treatment works to river. Bolt de-threaded on gates controlling the discharge.</td>
<td></td>
<td>£200,000</td>
<td>£60,000</td>
<td>£9,500</td>
</tr>
<tr>
<td>Planning</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v Ayling</td>
<td>1996</td>
<td>2 Cr App R (S)</td>
<td>Two counts of failing to comply with an enforcement notice contrary to s179(2) T&amp;CPA.</td>
<td>Failure to discontinue use of a field for storage of building materials and scrap. Second offence.</td>
<td></td>
<td>£2,000</td>
<td>dismissed</td>
<td>£2,250</td>
</tr>
</tbody>
</table>
APPENDIX 9

Memorandum from the Law Society

I write on behalf of the Law Society’s Planning and Environmental Law Committee in response to the request to submit views on the subject of the investigation by the Sub-Committee into corporate environmental crime. The Law Society is the body that regulates and represents the 100,000 solicitors practising in England and Wales. The Committee is formed of 20 practitioners expert in these areas of the law.

1. Do the bodies responsible for investigating and prosecuting corporate environmental crime have sufficient powers and resources to do so? Are they able to conduct robust and effective investigations into the source of the crime and mount effective prosecutions that target those who are responsible for the crime, as well as the person actually committing it?

No. The Environment Agency’s Spotlight on Business Performance in 2003 indicates that the Agency prosecuted 266 companies in that year and that the courts convicted 11 company directors for environmental crimes. 266 is manifestly not an accurate reflection of the number of companies committing environmental offences. The resources available to the Agency in monitoring, investigating and prosecuting companies are clearly inadequate. The absence of resources at the Environmental Agency and local authorities means that “offences” are going undetected or are being ignored.

The number of individuals prosecuted for environmental offences is complicated by the difficulty of identifying the person liable for the crime within the statutory definition of the offence. The directors who do receive convictions tend to be from smaller companies where the connection between the offence and the decision making within the company can be readily established. With larger companies the connection between the offence and an individual director is almost always impossible to establish.

2. Are the penalties for corporate environmental offences adequate? If not, how can penalties and punishments be better targeted to ensure that the criminal justice system is effective in acting as a deterrent?

No. Again the Environment Agency’s review of 2003 indicates that the average fine imposed by the courts on companies for environmental crimes was £8,412 which was £210 less than in 2002. As the Environmental Audit Committee’s recent reports on environmental crime and on fly-tipping, fly-posting, litter, graffiti and noise have shown, the current level of penalties is failing to act as a deterrent. All too many companies regard the possibility of fines for environmental offences as an incidental operational expense. Magistrates and judges need to have a greater awareness of the seriousness of environmental crime. All too often the absence of an individual who has suffered direct injury as a result of an environmental crime, means that there is a lack of appreciation as to the seriousness of damage to the environment.

3. What alternatives, outside the criminal justice system, should be considered for dealing with corporate environmental offences in order to reduce environmental harm by business? Should there be greater use of alternative means of punishment, such as the use of prohibition notices, civil penalties and the confiscation of company assets?

Innovative thinking by authorities is necessary. The London Borough of Camden has recently had significant success in obtaining Anti-Social Behaviour Orders against the named directors of entertainment companies to stop fly-posting for events and musical releases. The prospect of a personal conviction has proved far more influential than the occasional fine of the company concerned as the company can all too easily claim that the actual posting of their flyers is the responsibility of intermediate publicity companies rather than the company itself.

More creative use of civil penalties in this fashion is a real possibility. DEFRA is currently consulting on a range of further initiatives and offences to achieve “clean neighbourhoods” and amongst these is the proposal for powers to confiscate the vehicles responsible for fly-tipping. We would also recommend that, as a general principle, companies who offend should be required to pay for the remedial cost of repairing the damage they have caused to the environment. This would accord with and give real meaning to the “polluter pays” principle.

4. Are there too many environmental duties and responsibilities on corporate bodies which serve only to stifle their ability to compete in the market place? Are the laws and regulations applied uniformly across the business sector?

The CBI has recently complained about environmental legislation. However, its criticism is not of legislation as such, but the fact that the UK goes beyond the requirements of EU legislation when implementing into domestic legislation. Environmental legislation is intended to protect the environment and citizens. While there are undoubted costs for the business sector, there are also business opportunities.
For example, companies can no longer dispose of waste into water courses without a licence. That provides an incentive for companies to minimise waste in the course of their operations and generates business opportunities for others in safe waste disposal.

The complaints against red tape and over-regulation tend to emanate from the small and medium enterprise sector. However, unless their activity has a serious environmental impact, the burden of environmental legislation should be less burdensome for those companies. Law and regulation applies equally to the business community as a whole, but regulators tend to monitor larger companies both because of their potential impact on the environment and because they tend to be the companies which hold licences of, for example, the Environment Agency.

5. Is the Government doing enough to educate the business sector in terms of their legal obligations with regard to environmental issues which impact on their business? Is there sufficient dialogue and co-operation across Government and the business community to ensure that best practice, for example, can be shared?

In general Central Government has been deficient in not providing sufficient information for companies on environmental issues and, in particular, the matter of regulation. The Government tends to be slow in appreciating the practical implications of environmental legislation and regulation. The most obvious example is the failure to alert manufacturers, consumers and the waste disposal industry of new restrictions on the disposal of domestic refrigerators. The result initially was stockpiles of old fridges but in the longer term the industry has adapted and the problem has dissipated. Earlier action on the part of the Government in this instance would have avoided the problem.

The Environment Agency has a much better record with regard to those sectors and activities which it regulates in providing information on the “best available techniques” and making that information widely available. Being ultimately responsible for legislation and regulation, the Government should accept its responsibility for explaining to the business community the implications of new environmental legislation and regulation and providing far more assistance to companies in the form of guidance on how they should be able to achieve compliance.

September 2004